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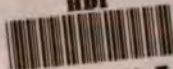
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SCHUYLKILL LEGAL RECORD

Containing

CASES DECIDED BY THE

Judges

Of The

Courts of Schuylkill County

With The Decisions of The

Supreme and Superior Courts

On Appeal From

Schuylkill County

Edited By

JOHN O. ULRICH

Of The

SCHUYLKILL COUNTY BAR

VOLUME 17

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Schuylkill Legal Record

Containing Opinions of the Judges of Schuylkill County
And the
Decisions of the Supreme and Superior Courts in Cases Ap-
pealed From Schuylkill County

Sweeney vs. Schuylkill Railway Co.

Negligence - Obstruction near car tracks - Duty of
passenger.

It is vain for a passenger alighting from a street car to say that she did not see the obstruction which caused her injury, when, by using her sense of sight, she would have seen her danger and been able to avoid it.

Motion to take off nonsuit. No. 237, March Term, 1919.

M. J. Ryan, for motion.

C. A. Snyder and A. L. Shay, contra.

BERGER, J. November 29, 1920.

The plaintiff brought her action for the recovery of damages for personal injuries sustained by her, as the result of a fall, as she alighted from one of the street railway cars operated by the defendant. The statement of claim alleges that she was a passenger on one of the defendant's cars on July 26, 1918, and that when it had come to a full stop at her destination, or at stop No. 9, she alighted from the car and "stepped and fell into and over a pile of loose stones deposited at said stop" in her immediate way. The negligence alleged is the carelessness of the defendant in permitting the pile of stones to remain at the stopping place.

She testified that the accident happened at seven A. M. She was unencumbered and the only passenger to alight. In describing how she alighted she said that "In getting off the car I stepped down with my left foot into a pile of

rocks and dirt, and in stepping there they gave way and I fell." She did not see the pile of stones upon which she stepped. It was circular and three to four inches high, but she did not see it until after she had fallen. It was daylight, and nothing obstructed her view. At the close of the plaintiff's case a compulsory nonsuit was entered, and the case is now before the court in banc on a rule to show cause why it should not be stricken off.

Assuming that the defendant was negligent in permitting the pile of stones to remain for a long period of time prior to the plaintiff's injury at stop No. 9, the duty nevertheless rested upon her to use her senses, and to exercise ordinary care, in alighting from the car upon which she was a passenger. It is vain for her to say that she did not see the obstruction which caused her fall, when by using her sense of sight, she would have seen her danger and been able to avoid it. For the reasons stated by the trial judge in entering the nonsuit, and upon the authority of *Twersky v. Pennsylvania Railroad Co.*, Appellant, 261 Pa. 6, 10, and *Baron v. Wilkes-Barre Railway Co.*, Appellant, 71 Pa. Superior Ct. 103, 108, the rule to strike off the compulsory nonsuit must be discharged.

AND NOW, November 29, 1920, the rule to strike off the compulsory nonsuit is discharged, and the prothonotary is directed to enter judgment in favor of the defendant upon payment of the jury fee.

Brobst vs. Troy

Waygoing crops - Forfeiture of crop by ending tenancy.

A tenant for years is entitled to but one crop of winter grain, as a waygoing crop, for each year of his tenancy.

A waygoing crop may be forfeited by the lessee terminating his tenancy.

Demurrer. No. 302 September Term, 1920.

B. V. O'Hare for plaintiff.

R. P. Hicks for defendant.

BERGER, J. November 29, 1920.

The plaintiff, Charles Brobst, brought this action against Grant Troy, the defendant, for the recovery of the value of a crop of rye which he had sowed upon a farm then in his possession, under a written lease with the owner, Lawrence Singley. The lease was for the term of five years from August 24, 1917, with the privilege on the part of the lessor to surrender the farm at any time during the term by giving three full months' notice to the lessor. On or before August 5, 1919, the plaintiff served a written notice upon the lessor of his intention to vacate the farm three months thereafter, and "in the fall of 1919," before the expiration of the time specified in the notice, sowed the crop of rye which the defendant, Grant Troy, who was in possession of the farm under the owner, Lawrence Singley, on July 20, 1920, prevented the plaintiff from harvesting and converted it to his own use. The foregoing is a summary of the material facts averred in the plaintiff's statement, which are admitted by the defendant by virtue of the affidavit of defense filed by him under the provisions of Section 20 of the Practice Act of 1915, denying, as a matter of law, the right of the plaintiff to recover.

The plaintiff contends that he has set out a good cause of action against the defendant for a wrong committed in preventing him from harvesting the crop of rye as a waygoing crop, and for the conversion of it to his own use. The contention of the defendant is that the plaintiff's statement does not set forth a good cause of action, because the facts averred therein are insufficient to entitle the plaintiff to the crop of rye as a waygoing crop. The question for determination therefore is whether a tenant, under a lease for a term of years commencing August 24th., terminable at the will of the tenant upon three months' notice to the landlord, can, after giving notice of his intention to quit, and

after having had an opportunity of harvesting any crop of winter grain which he may have sown in the summer or the fall of the year previous to the year in which he elects to terminate his tenancy by notice, sow a crop of winter grain and claim it as a waygoing crop.

At common law a tenant for years was not entitled to emblements where his estate expired by its own limitation, for it was his folly to sow where he could not reap, but by "Pennsylvania common law the tenant is entitled to the waygoing crop where the term ends, as is usual, in the spring. He is entitled to return during the summer after his estate has expired, and take his grain, which was sown in the previous autumn." *Mitchell on Real Estate and Conveyancing*, 167, 168. Had the lease out of which the controversy at bar arises been executed in the spring of the year, as is customary, the only ground upon which the right of the plaintiff to the waygoing crop could be questioned would be his surrender of the leasehold before the expiration of the term. The lease having been executed and the tenancy having begun on August 24th., makes it necessary to consider and pass upon the contention of the plaintiff that the custom entitling a tenant to the waygoing crop is applicable to all leases for a term of years regardless of the time or season of the year when they take effect.

In *Stultz v. Dickey*, 5 Binney's Reports, 285, the leading case upon the subject, evidence was received over the objection of the defendant to prove the general custom in the state that the tenant for a term certain is entitled, after the expiration of his lease, to enter and take away the crop of grain which he put in the ground the preceding fall. On appeal, the action of the court below was sustained in an opinion by Tilghman, C. J., in the course of which he said (288) :- "In the nature of the thing it is reasonable, that where a lease commences in the spring of one year, and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year

without having the benefit of a winter crop. If the parties intend otherwise, it is easy to control the custom by an express provision in the lease." It will be noted that the custom was held to be good because it was reasonable. In the later case of *Demi v. Bassler*, 1 P. & W. 224, the reason for the custom was stated to be that "if a tenant rents a farm for one year, it is understood that he is to take one crop of each kind of grain cultivated," and in the application of this principle it was held that it was unreasonable, and therefore not a good custom, to allow a tenant whose lease expired April 1st., and who sowed oats in the month of March preceding, to take the crop at maturity as a way-going crop. This doctrine received the approval of the late Chief Justice Sharswood in a lecture before the Law Academy of Philadelphia, tracing the development of a wide-reaching common law, as appears in *Commonwealth, Appelant, v. Lehigh Valley Railroad*, 165 Pa. 162, 171. More recently the cases sustaining this view of the law were cited in *Myers v. Elmer*, 17 D. R. 413, 414. This doctrine is peculiarly applicable to the case at bar, because if the contention of the plaintiff were sustained it would enable him to take three crops of rye under a tenancy of but two years, and would compel the owner of the land, or his next tenant, to go longer than one full year before being able to harvest a crop of winter grain.

The contention of the defendant that the plaintiff forfeited his right to the crop of rye, which he sowed as a waygoing crop, if any he had, is also sustained on the ground that the termination of the tenancy by the act of the lessee worked a forfeiture of the crop to the landlord: *Waugh's Executors v. Waugh*, 84 Pa. 350, 358. For the reasons stated the demurrer must be sustained.

AND NOW, November 29, 1920, demurrer sustained.

Williams vs. Independent Americans

Funeral benefits - Dues in arrears - Disability allowances.

Where an action is brought against a beneficial association to collect a funeral benefit the defendant cannot set up as a defense that the deceased was in arrears in his dues or assessments when he was entitled to a sum for allowance for a disability in excess of such dues or assessments.

Motion for new trial. No. 182, March Term, 1919.

A. D. Knittle and E. J. Maginnis, for motion.

R. R. Koch and M. A. Kilker, contra.

BERGER, J. September 13, 1920.

Sarah Williams, the widow of George Williams, recovered judgment in the sum of two hundred and fifty dollars in an action before a justice of the peace against Monument Council No. 847, Order of Independent Americans, for a funeral benefit claimed by her on account of the death of her husband, who was a member of that Order. The defendant appealed and the case was tried upon the transcript of the justice of the peace as a statement of the claim. The defense was that the plaintiff's decedent was more than thirteen weeks in arrears in the payment of his dues at the time of his death and therefore plaintiff was not entitled to funeral benefits, under the provisions of Section 5 of Article X of the defendant's Constitution.

The uncontradicted evidence is that George Williams was on the membership roll of the defendant when he died October 26, 1918. He had paid his last dues, at the rate of fifteen cents, weekly, on June 7, 1918, and at the time of his death he owed two dollars and forty-nine cents in dues, according to the account of the Financial Secretary of the defendant, or for a period of nearly seventeen weeks. The Constitution of the defendant provides that no funeral benefits shall be paid for the death of a member who is thirteen weeks or more in arrears. Meetings of the Council

were held weekly and the rules and regulations required dues to be paid at the meeting room. On September 27, 1918, which was the ending of a quarter, no meeting was held on account of the prevalence of influenza, and there is no evidence that any meeting was held thereafter before the death of Williams. He was not in arrears on September 27th. Article XVI of the Constitution provides that the dues of a member cannot be charged as arrears until after the adjournment of the Council. Article XXIII of the By-laws of the State Council, which is binding upon the defendant, provides that a member may be suspended for non-payment of dues, but not expelled for that cause, and requires notice in writing to be mailed to the delinquent at his last stated address. There is no evidence that the name of the decedent was placed upon a delinquent list, or that notice of delinquency was mailed to him.

On July 12, 1918, the Relief Committee of the Council reported that George Williams was injured June 30, 1918, and entitled to two dollars and twenty-five cents in benefits, and on July 19th another report of that committee was that he was entitled to ninety cents additional in benefits and that he had recovered July 15th. This sum of three dollars and fifteen cents, found by the Relief Committee to be due the decedent, was never paid. At the meeting of the Council held July 12th, on motion of Frank Faust, a member of the Order but not a member of the Relief Committee, it was determined to withhold the payment of benefits awarded by the Relief Committee until after Williams had been notified to appear at a meeting of the Council in reference to his injury. Williams was notified to appear, but failed to do so. No further action in regard to the payment of sick benefits to him was taken.

At the trial the defendant offered to prove that Williams had received his injuries in a fight; that he was notified that his benefits were withheld and would not be paid until he appeared before the Council, but that he failed to do so; that benefits were not customarily paid by the Relief

Committee, but that a motion of the Council authorizing payment was a condition precedent to payment; that Williams had made declarations after July 12th, and before October 26th, the date of his death, that he was no longer a member of the Order. All these offers were overruled and at the close of the case a verdict was directed in the plaintiff's favor, no evidence having been offered or introduced to show that the defendant had ever, by its action, determined that Williams was not entitled to the benefits which the Relief Committee had awarded him. A motion for a new trial, based on the allegation that the court erred in rejecting the defendant's offers of testimony and by directing a verdict against the defendant, which was filed, is now before us for disposition.

The defendant is a beneficial association and the burden was upon it to prove that the deceased was not a member in good standing at the time of his death; *Crompton v. Pittsburgh Council No. 117*, 1 Pa. Superior Ct. 613, 623; *Sullivan v. Supreme Council of the Catholic Mutual Benefit Association*, Appellant, 266 Pa. 57. If the defendant either introduced evidence, or if the court overruled offers of competent evidence tending to prove that the deceased was in arrears at the time of his death, the motion for a new trial must prevail. It is undisputed that the deceased had not paid any weekly dues for a period of nearly seventeen weeks immediately preceding his death, nevertheless his name had not been placed upon the list containing the names of those who were delinquent, and no notice of delinquency had been mailed to him. The dues of the members of the Council were payable weekly at its meetings. Some members paid their dues to the Financial Secretary at places other than the place of meeting, but Section 1 of Article XVI of the Constitution provides that "The dues of a member of a Council cannot be charged as arrears until the Council has adjourned." There was no meeting of the Council after September 27, 1918, when the deceased was not in arrears, until after his death. Consequently the dues of the de-

ceased, amounting to two dollars and forty-nine cents at the time of his death, could not have been charged to his account as arrears, because the time for making his payment did not expire until after the adjournment of a meeting, which would be held after September 27, 1918. We are of the opinion, therefore, that the uncontradicted evidence is that the decedent was not in arrears in the payment of his dues at the time of his death, within the meaning of the Constitution of the Council.

Assuming that we are in error in thus construing Section 1 of Article XVI of the Constitution, it becomes necessary to consider whether the deceased was thirteen weeks or more in arrears at the time of his death, notwithstanding sick benefits in the sum of three dollars and fifteen cents had been found to be due him by the Relief Committee. In *Holyland v. Protected Home Circle*, Appellant, 71 Pa. Superior Ct. 66, it is held that where there is due to a member of a beneficial society a disability allowance greater than assessments due, the society cannot set up a forfeiture for non-payment of assessments. The defendant does not dispute this principle of law, but contends that the evidence introduced, and that offered by it which was rejected by the court, is sufficient to establish that no sick benefits were due the deceased, so as to be applicable to the payment of his dues, thus raising a question for determination by the jury, if the contention be correct.

Section 1 of Article X of the Constitution constitutes the counselor, vice-counselor and the assistant recording secretary of the Order the Committee of Relief to visit sick and disabled members, and authorizes that committee to pay weekly sums to members of the Order who are qualified and entitled to receive benefits under the provisions of the Constitution and By-laws. Section 2 of Article X of the Constitution excepts from the payment of benefits those whose sickness or disability proceeds from intemperance or other immoral conduct. Section 6 of the same article gives the Relief Committee, in cases where they believe the sick-

ness or disability to be feigned, the right to refer the question of sickness or disability to one or more physicians, whose decision, if approved by the Council, shall be final, unless an appeal to the State Council be taken. In no other case is the approval of the Council required before the payment of benefits can be made, from which we conclude that the power of the Relief Committee, unless corruptly exercised, to determine that Williams was entitled to sick benefits in accordance with the Constitution and By-laws of the Order was absolute, and that their action does not require the approval of the Council. The report of the Relief Committee on July 19th, that the sum of three dollars and fifteen cents was due the deceased by the Order for sick benefits was, in our opinion, under the evidence in this case, binding upon the Order. The very least that can be said in favor of the report of the Relief Committee is that it was prima facie evidence that three dollars and fifteen cents was due the deceased. Granting, for the sake of argument, that the order might have withheld payment until it had determined whether the disability or sickness of Williams was due to intemperance or immorality, and in the event of a decision adverse to him, to decline payment, it never proceeded to a determination of that question, which remains undetermined to this date, but sought to have it determined by the jury as a defense to this action. For these reasons the motion for a new trial must be overruled.

And now, September 13, 1920, the motion for a new trial is hereby overruled and judgment is directed to be entered upon the verdict in favor of the plaintiff upon payment of the jury fee.

Wenzel vs. Brennan

Right of action - Legal and use plaintiffs - Waiver by lessor.

The right of a use plaintiff to maintain an action depends upon the right which the legal plaintiff has to maintain an action against the defendant.

When the lessor releases the sub-lessee he waives all rights which he had against the lessee.

Motion for new trial. No. 210, March Term, 1919.

J. B. Reilly and B. J. Duffy, for rule.

R. J. Graeff, contra.

BERGER, J. September 13, 1920.

This is an action upon a written contract between David J. Brennan and Christ Wenzel by which Brennan, who was the owner of a building in Tamaqua known as Brennan's Cafe in which a retail liquor business was conducted, leased the building to Wenzel for a period of three years, from June 8, 1915, at a monthly rental of fifty dollars. By the lease Wenzel was given an option to purchase the building for seventeen thousand dollars, subject to the right of sale by Brennan at any time during the term, after first having given Wenzel notice of his intention to sell, in case he did not exercise his option. If the option was not exercised by Wenzel, or if the property was not sold by Brennan to some other person during the three year term, the lease was to be considered as renewed for a further term of three years, unless one or both of the parties thereto gave thirty days notice prior to June 8, 1918, of an intention to terminate it. The good will, license, fixtures and certain personal property in a schedule attached to the lease, and made a part thereof were sold, assigned, transferred and set over by Brennan to Wenzel upon payment of seventeen hundred dollars by him, with the proviso that if the real property was sold by Brennan, or if the lease was not extended at the end of the term, or if Brennan terminated the lease by giving the

required notice, Wenzel was to surrender the retail liquor license to Brennan and leave upon the premises the fixtures and personal property enumerated in the schedule aforementioned, or articles of like kind and value, and Brennan was to repay Wenzel the sum of seventeen hundred dollars, but if Wenzel did not deliver the retail liquor license to Brennan, or was unable to do so on account of its revocation, he was to forfeit all claim to the seventeen hundred dollars.

On the date of the execution of the lease it was assigned to Wm. B. Shugars. At that time the property was occupied by a man named Lynch as the licensee, and his license was evidently transferred to Harry G. Wenzel, who had it renewed from time to time. Three months prior to June 8, 1918, Wenzel gave Brennan notice of his intention to terminate his lease at the expiration of three years, and at the end of that period vacated the premises, left the retail license upon the premises, and delivered the furniture and personal property enumerated in the schedule, or property of like kind and value, to Brennan, who accepted it with an expression of satisfaction. Brennan, before his death which occurred October 24, 1918, refused payment of the seventeen hundred dollars to Wenzel, and his widow, Bridget Brennan, his executrix, having also refused payment, this suit was brought. The lease and the sale of the good will, fixtures, personal property, and license was to Christ Wenzel, but the person to whom the license was transferred and who occupied the leased premises throughout the entire three year term was Harry G. Wenzel. The surrender of the premises and the delivery of the fixtures, license and personal property were made by Harry G. Wenzel. The defendant's admissions of the 6th, 7th, 8th, 9th and 10th paragraphs of the plaintiff's statement in her affidavit of defense are conclusive that the substitution of Harry G. Wenzel as the tenant in place of Christ Wenzel, was with the lessor's consent. The foregoing statement of the facts was established by the admissions contained in

the pleadings, together with the uncontradicted evidence at the trial, at the close of which the court directed a verdict in favor of the plaintiff for the full amount of his claim.

A motion for judgment n. o. v. in favor of the defendant has been filed, based on the refusal of the court to affirm the second point for charge asking for a direction of a verdict in her favor. A motion for a new trial was also made by the defendant and reasons to support it have been filed. These motions do not require a separate consideration, because the motion for a new trial also raises the question raised by the motion for judgment n. o. v. The theory of the defense is (1) that the lessee could only demand the repayment of the seventeen hundred dollars in the event that the lease was determined by the lessor's action; (2) that the seventeen hundred dollars was the consideration paid by the lessee for the good will of the licensed premises for the term stated in the lease, and having had the enjoyment thereof, he could not recover its value at the end of the term; and (3) that under the pleadings and the evidence no right of recovery by the use plaintiff has been established. We shall consider these contentions in the order in which they are stated.

The first contention is that the clause in the lease "in the event the lease is not extended at the end of the term," relates solely to a failure by the lessor to extend the lease, and that the lessee had a three year term under the lease which automatically renewed itself at the expiration of that period for an additional period of three years, unless he had forfeited his rights under the lease by the commission of some act or acts of forfeiture enumerated therein. This construction of the lease, it seems to us, ignores entirely the provision that "In the event of both, or either of the parties, failing to notify the other of an intention to remove or cancel this lease thirty days before the end of the said three year term, then this lease shall be considered as renewed for an additional period of three years." We construe this provision to mean that either party acting alone, or

both acting jointly, had the power to give the notice thirty days before the expiration of the three year period requisite for its determination. It is admitted that the lessee gave such notice, and, in our opinion, that was sufficient to terminate the lease.

If, as the defendant contends, the seventeen hundred dollars represented the value of the good will only, there would have been no need for attaching to the lease a schedule of the personal property, which was transferred by the lessor to the lessee, and which, under certain contingencies, he was to redeliver to the lessor, or if the good will for a three or a six year term was considered as having any value beyond that for which compensation was made to the lessor by the payment of a monthly rental for the licensed premises and by allowing him to use seventeen hundred dollars of the lessee's money during his tenancy, it is likely that a valuation would have been placed by the parties upon the good will, as well as the personal property, when the agreement was drawn and executed. Moreover, the surrender of the premises at the end of the term, together with the license to sell liquor at retail upon the demised premises, placed the good will again into the hands of the lessor. Under the terms of the lease and the uncontradicted evidence we are of the opinion that Christ Wenzel was entitled to the repayment of the sum of seventeen hundred dollars after the notice given by him to the lessor of his intention to terminate the lease, and upon the surrender of the fixtures, license, personal property and the delivery of the possession of the premises.

But the defendant also contends that the use plaintiff was not entitled to recover because he had not established the consideration for the assignment of the lease to him by Christ Wenzel, the lessee, to which assignment the lessor had given his consent in writing. It is established by the pleadings that the lessor waived any question which might have arisen from the occupancy of the premises by Harry G. Wenzel instead of Christ Wenzel. It seems quite clear

therefore that the right of the use plaintiff to recover was entirely dependent upon the legal plaintiff's right of recovery, for, as was said in *Howes v. Scott*, 224 Pa. 7, a case wherein the right of recovery by the use plaintiff was involved, "The right to maintain this action does not depend upon the interest which the use plaintiff may have in the result. It depends solely upon whether the legal plaintiff has a cause of action against the defendant. If he cannot maintain the action, the use plaintiff cannot do so. If the legal plaintiff has a good cause of action, it is immaterial, so far as the defendant is concerned, whether the use plaintiff has any interest or not. That is a matter which concerns the legal and the use plaintiffs and not the defendant." For the reasons hereinabove set forth both motions must be overruled.

And now, September 13, 1920, the motions for a new trial and for judgment n. o. v. are overruled. Let judgment be entered upon the verdict in favor of the plaintiff upon payment of the jury fee.

Rodestein vs. Fried

Statement of claim - Affidavit of defense.

The statement must set forth a cause of action with accuracy and precision and the proofs must correspond.

An action founded upon a breach of an express contract cannot be sustained by proof of a breach of an implied contract.

An averment in an affidavit of defense that the goods were bought upon an express contract is sufficient to defeat judgment in an action upon a book account.

Rule for judgment. No. 205, March Term, 1920.

J. H. Garrahan, for rule.

R. P. Swank, contra.

BERGER, J. November 1, 1920.

This is an appeal from the judgment of a justice of the peace. The plaintiff, in his statement filed pursuant to our rule of court which provides that in such cases the pleadings shall in all respects conform to the Practice Act of 1915, unless the parties agree in writing to proceed on the transcript, founds his action upon a book account for goods sold and delivered. An implied contract therefore is the basis of the claim. The defendant filed an affidavit of defense denying generally any indebtedness to the plaintiff, and setting up that the goods for the value of which this suit is brought, were bought upon a special contract of warranty with the plaintiff's salesman, and that he returned the goods promptly after having discovered that they were not as warranted. The plaintiff then took a rule for judgment for want of a sufficient affidavit of defense and assigned eight reasons in support thereof. After argument of the rule, and before its disposition by the court, the defendant asked leave to file a supplemental affidavit of defense.

The supplemental affidavit of defense, which sets out the defense in greater detail than the original, in the 12th paragraph avers the return of the goods on December 13, 1920, and the refusal of the plaintiff to receive them, and in the 6th, 7th, 8th, and 9th, paragraphs avers that the goods were obtained upon an oral contract made with the plaintiff's salesman. The plaintiff, in the brief filed in opposition to the allowance of a supplemental affidavit of defense, states that the only new matter in the supplemental affidavit of defense appears in paragraph 12. Thus it is unquestioned that the original affidavit of defense avers that the goods were obtained upon an express, and not upon an implied, contract. Moreover, if the action had been founded upon an express contract, the plaintiff's statement would doubtless have shown whether the contract was oral or in writing, as is required by Section 9 of the Practice Act of 1915.

It is well settled that the plaintiff's statement must set forth his cause of action with accuracy and precision, and

that the proofs must correspond: Cullen, Appellant, v. Stough, 258 Pa. 196, 199. An action founded upon a breach of an express covenant cannot be sustained by proof of a breach of an implied covenant: Dodson Coal Co., Appellant, v. Delano, et al., 258 Pa. 385. And so an averment in an affidavit of defense that the goods purchased were bought upon an express contract is sufficient to defeat judgment in an action upon a book account: Schaefer v. Lange, Appellant, 37 Pa. Superior Ct. 617. See also The White Co., Appellant, v. Quin, 71 Pa. Superior Ct. 404.

The rule for judgment for want of a sufficient affidavit of defense must therefore be discharged upon the original affidavit of defense, which makes it unnecessary for us to pass upon the application for leave to file a supplemental affidavit of defense.

And now, November 1, 1920, rule for judgment for want of a sufficient affidavit of defense discharged.

Angello vs. Phila. & Reading C. & I. Co.

Compensation - Statement in writing of facts - Answer
- Appeals.

Where a conclusion of fact is deduced from other facts established the latter facts should be fully set forth in writing.

Section 425 of the Workmen's Compensation Act of 1919 requires the board to make a statement in writing of the facts found by it.

Under Section 423 of the said act the board may disregard the findings of fact made by the referee. It may, in addition to the evidence taken before the referee, take other evidence, and it may base its findings either upon the evidence taken before the referee and the board, or exclusively upon that taken before the board. If the board takes into consideration the evidence taken before the referee, that fact should be made to appear of record.

Under Section 416 of the said act the board may treat a failure to answer a material allegation in a petition as an admission, or require proof of the fact, notwithstanding the admission. When the board elects to disregard such an implied admission, and requires proof of the fact of its own motion, its action should be made a matter of record.

Admissions may be established by pleadings, even though the pleadings were filed in an action wherein the parties are not identical with those upon the record.

Appeals from the action of the Compensation Board to the court of common pleas can only be taken on matters of law. The evidence only becomes a part of the record for the purpose of review, when by an exception filed the question that there is no competent evidence to sustain the award is raised.

Appeal from Compensation Board. No. 374, May Term, 1920.

J. M. Price, for plaintiff.

Whalen & Ellis, for defendant.

BERGER, J. September 27, 1920.

This petition, filed by the defendant above named, pursuant to sec. 413 of Article IV of the Act of June 26, 1919, P. L. 642, amending the Workmen's Compensation Act of 1915, to modify an agreement for the payment of compensation to Josephine Angello on account of the accidental death of her husband, James Angello, while in the course of his employment for the Philadelphia and Reading Coal and Iron Company, the employer, was filed September 27,

1919. It is based on the allegation that Josephine Angello, while the agreement for compensation was effective as to her, claimed and was awarded, as the common law wife of Fidele Martuscelli, insurance from the United States War Risk Insurance Bureau, on policy No. 277149, for five thousand dollars, in which she was named as the beneficiary by the insured, who died in service September 27, 1918. It is further alleged in the said petition that "Her right to compensation under said Agreement has ceased on account of changed status." On October 9, 1919, Josephine Angello made answer to the petition and failed entirely to deny that she was in receipt of War Risk Insurance, awarded upon her claim that she was the common law wife of Fidele Martuscelli, or that her right to compensation under the compensation agreement had ceased on account of a change in her status as the widow of James Angello. The petition to modify was originally referred to referee T. C. Seidel of the Second District for investigation and determination, but was subsequently assigned at the request of the petitioner, to Warren C. Graham of the First District. After hearing, he refused the petition on the ground that the common law marriage of Josephine Angello with Fidele Martuscelli had not been established, and from this decision an appeal was taken by the petitioner to the board, which granted a hearing de novo, January 7, 1919. The hearing de novo was held at Pottsville March 9, 1920, and resulted in a refusal of the petition. Hence this appeal.

The board made no statement in writing of the facts found by it, as is required by Section 425 of the Act of June 26, 1919, *supra*. In *Gurski v. Susquehanna Coal Company*, Appellant, 262 Pa. 1, it was said that a "referee should make his findings of fact so comprehensive and explicit as to disclose the full story of the accident," and from *Flucker, Appellant, v. Carnegie Steel Company*, 263 Pa. 113, it appears that the board is held to a higher degree of care than the referee, in making its statement of facts in writing. In *Glaser v. Canfield*, 27 D. R. 861, it was said by Auden-

ried, P. J., in speaking of the duty of the board to state in writing its findings of fact, that "where a conclusion of fact is deduced from other facts established by the evidence, the latter facts should be fully set forth in writing." A reference to the opinion of the board and to a certified copy of the testimony taken by it at the hearing *de novo* fails to disclose whether the board, in reaching its conclusion, took into consideration either the referee's findings of fact, or the testimony taken before him. Section 423 of the Act of June 26, 1919, *supra*, provides that in appeals from the award of the referee "the board may disregard the findings of fact of the referee, and may examine the testimony taken before such referee, and if it deem proper may hear other evidence, and may substitute for the findings of the referee such findings of fact as the evidence taken before the referee and the board, as hereinbefore provided, may, in the judgment of the board, require, and may make such disallowance or award of compensation or other order as the facts so found by it may require." Prior to the passage of this amendment the testimony taken before the referee might only be accepted by the board as evidence at a hearing *de novo* by agreement of the parties: *McCauley v. Imperial Woolen Company, et al*, Appellant, 261 Pa. 312, 319. We are of the opinion that "may" in the section above quoted is used in a directory, as distinguished from a mandatory sense, and that the legislative purpose was to enable the board to resort to the testimony taken before the referee in the absence of an agreement between the parties, but did not make it compulsory for it to do so. If the board, therefore, in making its findings after a hearing *de novo*, takes into consideration both the testimony taken before the referee and that taken before it, such action should appear of record in order to enable the court, on appeal, to determine with certainty upon what testimony the board acted.

Section 415 of Article IV of the Compensation Act of 1915, which prescribed the effect to be given to an answer filed to a petition in compensation cases, provides that

"Whenever all adverse parties in interest have concurred in the answer, all facts not denied therein shall be deemed admitted, and no testimony shall be required from the petitioner or petitioners, or heard on behalf of the adverse parties, upon any fact not controverted in such answer." Section 416 of the Act of June 26, 1919, which supersedes it by amendment, provides that "Every fact alleged in a petition not specifically denied by an answer so filed by an adverse party shall be deemed to be admitted by him. But the failure of any adverse party or of all of them to deny a fact so alleged shall not preclude the board or referee before whom the petition is heard from requiring, of its or his own motion proof of such fact." Both the referee and the board acted upon the petition as though it had plainly alleged without setting forth the evidence upon which the petitioner relied, that the claimant had changed her status as the widow of James Angello to that of having become the widow of Fidele Martuscelli. Under paragraph 9 of section 307 of Article III of the Workmen's Compensation Act of 1915, all the petitioner was required to establish to have the compensation agreement modified as to Josephine Angello was that she had changed her status by remarriage. It cannot be determined from the record whether the board deemed her failure to deny the alleged changed status as an admission of it, or whether, (as it had a right to do, notwithstanding her failure to deny the allegation, it required proof of it. From the opinion filed by the board it may be inferred that it required proof other than the admissions in the pleadings to establish the alleged change of status. In our opinion, whenever the board or referee elects not to treat the failure to deny a material allegation of a petition as an admission of it, and of its or his own motion requires other proof, such action should be taken before hearing and made a matter of record. This is necessary so that the petitioner may know what he is required to prove, and that the court, on an appeal from a decision of the board, can ascertain from the record with certainty what the issue was and upon whom.

the burden of proof rested, and upon what evidence the action of the board was based.

Under Section 427 of the Act of June 26, 1919, appeals from the action of the board to the court of common pleas can only be taken on matters of law, and in such appeals our right to pass on the testimony is limited to cases in which the exceptions filed in support of the appeal raise the legal question that certain specified findings of fact are "unsupported by competent evidence." *Zukowsky v. Philadelphia & Reading Coal & Iron Co.*, 48 C. C. 524, 16 Schuylkill Legal Record, 138. The first, second, and fourth exceptions filed in support of this appeal, do not raise the legal question of the lack of competent evidence to sustain any finding of fact. In fact, these exceptions merely specify certain excerpts from the opinion of the board as error. This is probably due to the difficulty of raising the question of the want of competent evidence to sustain a finding, in cases in which findings of fact are not separately stated. Therefore we have not examined the testimony.

The third exception raises the legal question whether the board erred in holding that the claimant's affidavits filed with the Federal Government to obtain War Risk Insurance are mere evidence of her bad faith in that matter and without effect in this proceeding. The declarations of the claimant in the affidavits filed by her with the War Risk Bureau were to the effect that she was the common law wife of Fidele Martuscelli. The record does not disclose whether it was necessary for her to establish that fact in order to secure payment to her of the insurance as the beneficiary of Martuscelli; but, even though the affidavit was inoperative or unnecessary for the purpose for which it was intended, it is, nevertheless, competent evidence against the claimant to prove an admission made by her. Admissions may be established by pleadings, and it is not necessary to the competency of a pleading as evidence to prove an admission or declaration against interest that it be one that was filed in an action between the same parties. In *Limbirt v. Jones*,

136 Pa. 31, 34, Mr. Justice Williams, in speaking of the effect of a declaration against interest made in a pleading, said: "It did not conclude him on that subject, or prevent his making any explanation of the statement which the notice contained, but it was competent and relevant. The jury might not regard it as very important, but that was a question for their determination. Its admissibility was the only question before the court. The plaintiff was asserting a claim for damages, and supporting it by his own oath as a witness. Very clearly, therefore, his previous declarations upon the same subject were admissible against him, both because they were the declarations of the party, and because they affected, or tended to affect, the degree of credibility to which he was entitled as a witness. It is not necessary to cite authorities in support of a proposition so elementary." It follows that the board erred as a matter of law in entirely disregarding the claimant's affidavits made to secure War Risk Insurance.

For the foregoing reasons the fourth exception is sustained. The record in this case must be remitted to enable the board to make a statement in writing of the facts found by it, and for further hearing and determination in accordance with the views herein expressed.

And now, September 27, 1920, the action of the Workmen's Compensation Board is reversed, and the record is remitted for further hearing and determination.

Cosgrove vs. Darkwater Coal Co.

Act of June 7, 1907, P. L. 440 - Jurisdiction in equity as to legal title.

When a case in equity presents a controversy over a title at law a court in equity should not assume jurisdiction until such title has been established at law, unless there be a strong and mischievous case or pressing necessity which entitles the party to call to his aid such jurisdiction.

The case should be certified into the law side under the act of June 7, 1907, P. L. 440 to determine the legal question.

Bill in equity. No. 1. September Term, 1918.

William Wilhelm and T. A. McCarthy, for plaintiff.

J. F. Mahoney and L. L. Frank, for defendant.

BECHTEL, P. J. November 8, 1920.

In this case the bill of complaint was filed July 27th., 1920. September 28th., 1920, a motion was filed in which the court was asked to certify the bill in equity into the Common Pleas for hearing, in accordance with the Act of Assembly, approved June 7th., 1907, P. L., 440. On the 19th. of August, 1920, the answer to the bill was filed.

The bill of complaint alleges title to the property in dispute to be in the plaintiff, by reason of the fact that she has, for upwards of forty years, been in continuous, open, notorious and adverse possession of the same. The bill further alleges that the piece of ground aforesaid is chiefly valuable because of the rich deposits of anthracite coal contained in it, the title to which is in your orator. How the complainant derived title to the coal is not stated in any other way further than that above referred to by virtue of adverse possession and we must presume that the possession was of the coal as well as the surface.

We do not think it necessary to indulge in any extended argument in support of the conclusion which we have reached in this case. The same question was considered and decided by our Brother Koch in the case of Palmer, the plaintiff vs. The Sanner Hardware Company, Inc., and Gordon A.

Nagle, defendants, No. 2, July Term, 1920. In this case the plaintiffs claimed the right to the use of an alley by adverse possession and as was there well stated: "On the face of the bill it is made to appear that our jurisdiction in this case must turn upon the plaintiff's actual right in law, a right which has not been established at law, nor conceded by the defendants. As in *O'Neil v. McKeesport*, 201 Pa., 386, the bill presents a controversy over a title at law. And, until such title has been established at law, a court in equity should assume no jurisdiction, unless there be a strong and mischievous case or pressing necessity which entitles the party to call to his aid such jurisdiction."

We think, in the light of the numerous authorities cited in that opinion, there can be no room for argument as to what conclusion we should reach in this case.

AND NOW, November 8th., 1920, this case is certified to the law side of the court at the costs of the plaintiff.

Dumbluskey vs. Phila. & Reading C. & I. Co.

Appeals from Compensation Board - Review of testimony by the Court.

When the evidence in a case for compensation shows that it was sufficient to sustain the findings made by the referee the court will not disturb the finding.

Appeal from Compensation Board. No. 285, September Term, 1920.

Whalen & Ellis, for appeal.

BECHTEL, P. J. November 8, 1920.

In this case seven exceptions have been filed to the findings of fact of the referee and the conclusions reached by the Compensation Board on Appeal. All these exceptions are to the findings of fact of the referee, it being claimed

that there was not sufficient competent evidence upon which he could base his findings or make the findings which he did and that he erred in the conclusion of law that there was a direct connection between the injury and death of the deceased.

The powers of the court with relation to the review of the testimony have been very clearly defined by Mr. Justice Kephart, speaking for the Supreme Court in *Kuca vs. The Lehigh Valley Coal Company* not yet reported. We have carefully examined the testimony in this case and feel that it is amply sufficient to sustain the findings made by the referee. It appears from the evidence that the deceased and a co-laborer were engaged in timbering a certain part of the mine and while placing in position a collar of considerable weight, the deceased complained that he had been squeezed or bumped by the collar and had a pain in his chest. His co-worker did not see the accident, for the reason that each man was engaged at his end of the collar and could not or did not see his companion. Immediately upon complaining of the injury, the deceased left the mine; this being about 1:30 o'clock P. M. He applied for and received a compensation slip and proceeded to his home, arriving there about quarter after or half past two. Counsel for the defendant claims that his statements made immediately upon his arrival home are not part of the *res gestae*. We are not prepared to say that this position is correct, in view of the fact that in less than an hour from the time of the injury, the deceased reaching his home, told his wife about it. It might well be considered that it was part of the *res gestae*, but we do not think it necessary to decide this point, for the reason that we feel that there is sufficient other evidence to support the findings of fact and conclusions of law made by the referee in this case.

It will be noticed that the deceased, a man in full vigor and health, while working, complained immediately to his co-laborer of the accident. He quit work at once, returned to his home and summoned the compensation doctor. Af-

ter waiting two or three hours in vain for him to call, the result of attempting to get two or three other physicians, was the calling of Dr. Berkheiser. From this time on, at different times during his illness, some four or five doctors were called to attend the deceased. These doctors all agreed that he was suffering from pneumonia in both lungs. The family physician diagnosed it as traumatic. Some of the other physicians thought it was the result of influenza, which they say was prevalent at this time. Some, if not all of them, found a slight injury at the ninth or tenth rib. None of them swear that it was impossible or improbable that traumatic pneumonia would develop from an injury such as this. We, therefore, feel that the referee was entirely justified in his findings of fact and conclusions of law, as was the Compensation Board in affirming them.

AND NOW, November 8th., 1920, the findings of fact and conclusions of law of the Compensation Board are hereby affirmed and judgment is directed to be entered in favor of the plaintiff and against the defendant in the sum of \$4297.50 to insure the payment in accordance with the schedule filed by the referee in this case.

Dietrick vs. Carl

Warranty in sale of goods - Act of May 19, 1915, P. L. 543.

The act of May 19, 1915, P. L. 543 provides that where a buyer makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose.

Motion for new trial. No. 306, September Term, 1919.

J. L. N. Channell, for rule.

J. W. Moyer, contra.

KOCH, J. November 8, 1920.

The defendant, through an agent of the plaintiffs, ordered a car of lime tailings or screenings at two dollars and forty-five cents per ton. One Phillips, the plaintiffs' agent, testified that the tailings were sold f. o. b. Lauderdale, Pa., the point of shipment, whereas the defendant testified they were sold f. o. b. Auburn, Pa., point of destination. Plaintiffs loaded the tailings upon a gondola car and when they arrived at Auburn they were wet and soaked with rain, the lime in fact having become slacked, and a heavy hard crust formed over the top of them. The defendant declined to accept the tailings in that condition and the plaintiffs allowed the car to stand until the railroad company sold the tailings and applied the proceeds toward the payment of freight and demurrage. Plaintiffs having sued for the price of the tailings, including the freight and demurrage, the jury rendered its verdict in favor of the defendant.

The plaintiff's tenth point for submission to the jury reads as follows:

"10. If the jury find that the sale was made f. o. b. Lauderdale, or Temple, as testified to by Phillips, then the lime became the property of Carl at that place, and if it was damaged in transit, this would be no defence against plaintiffs' claim." In the course of his examination the said Phillips testified, concerning the car-load of tailings that "it was hard to unload soaked and wet." "He wanted it for his farm." "Q. Did he say what kind of condition he wanted it shipped in? A. Wanted it dry, not so wet. Q. Wanted it dry? A. Yes, sir. Q. He told you he would not receive it if it was wet and water soaked? A. Yes, sir. That is what he said." "Q. Did you stipulate then that it was to be shipped in a closed car or an open car? A. I always thought lime to be loaded in house cars. I never saw lime loaded in gondolas." Again, "I never expected, of course, that, and I never made any bargain in what it was to be

loaded, because I did not know anything of it. Q. But was not your bargain it was to be dry lime screenings at Auburn? A. Well, it was to be the way it is down at the plant. But that time when I sold it it was not in the rainy weather that time I sold it."

In view of the testimony of the said Phillips, we answered the said point thus:

"10. We deny that point, because if the shipment was not made in accordance with the understanding then they would still be responsible. That is to say, if this lime was to be sent reasonably dry, it was their duty to see that it was sent in a proper vehicle for its conveyance, to wit, a closed car, or other means taken to prevent the rain from falling into it."

The plaintiffs assigned this answer, just quoted, as error and as a good reason for a new trial. We think, however, the answer to the point was and is correct. Suppose the contract concerned the purchase of a car-load of flour or cement in bags f. o. b. point of shipment and the seller were to load the same upon a gondola car, and, in transit, the flour or cement should be soaked and completely spoiled with rain, would any one hold that the buyer would have to pay the price agreed upon? Surely not, because the seller's duty in the premises was grossly neglected and ignored. Phillips' testimony was sufficient for the jury to find that Carl was to get dry tailings or screenings so that he could scatter the same over his land. It is an undisputed fact in the case that the tailings had become caked and water soaked stuff hardly fit for scattering over defendant's land. The manufacturers must or, at least, should have known what would happen to the screenings in case of rain and it was their duty to take proper precaution against that eventuality. If the plaintiffs sold the screenings free on board at Lauderdale, it was their duty to select a proper car. Having failed in that duty, we do not see why the defendant should be held to answer for the plaintiff's clear neglect of duty.

The plaintiffs further contend that we erred in affirming the defendant's third point, which point reads as follows:

"3. Where property, such as this lime was, is sold by description the goods must be reasonably fit for the purpose for which they are bought and must be merchantable." The evidence shows that the screenings were to be spread over defendant's land. Both Phillips and Carl testified to that effect. The first and second paragraphs of the Fifteenth Section of "An Act relating to the sale of goods," approved 19th. day of May, 1915, P. L., 543-547, provides, that, "Where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose" and, "Where the goods are bought by description from a seller who deals in goods of that description (whether he be grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality."

The screenings were fit to be scattered over defendant's land when they were loaded on the gondola at Lauderdale, and, if they had not been rained upon in transit, they would have been fit upon their arrival at Auburn. Plaintiffs' counsel insists that a delivery to the carrier was a delivery to the defendant, and, assuming the contract to have been as claimed by the plaintiffs, we find no fault with the contention, but it was plaintiffs' duty to ask for a proper car in which to make the delivery. And counsel further contends, that as the car was not a proper car, Carl should have received the tailings upon their arrival at Auburn and sought to recover damages from the railroad company. The contention is untenable; it was plaintiffs' duty to ask for and get a proper car before making the delivery.

The next reason assigned by the plaintiffs for a new trial is our affirmance of the defendant's fourth point to the jury, which is as follows:

"4. If the jury believe from the evidence the contract was the lime should be delivered dry at Auburn, it was the duty of the plaintiffs to so load it that it would reach its destination in that condition, and if they failed so to do they cannot recover, and the verdict should be for the defendant." The plaintiffs contend that the pleadings do not warrant the submission of the point just read, because under the provisions of the Sixteenth section of the Practice Act nineteen fifteen, P. L., 486, neither party to a suit shall be permitted to make any defence which is not set forth in an affidavit of defence or the plaintiff's reply.

In the plaintiffs' statement the contract is stated thus:

"3. On or about March 19, 1919, the defendant requested the plaintiff's, through plaintiffs' agent, to ship to him one car-load of lime tailings.

"4. The defendant offered and agreed to pay the plaintiffs for said lime tailings at the rate of \$2.45 per ton, the defendant further agreeing to pay freight charges on same to Auburn, Pa.

"5. The plaintiffs accepted the order of the defendant as aforesaid," etc.

We quote enough to show defendant's reply as set out in his affidavit of defence. The third paragraph of plaintiffs' statement is denied. On or about March 19, 1919, I bought from one Francis Phillips, a farmer in Auburn, a car-load of screening lime, not to be water drenched," etc. "4. I deny paragraph four of plaintiffs' statement. The price I was to pay for the dry lime screenings was to be so much per ton f. o. b. Auburn." In the eighth paragraph of his affidavit of defence, the defendant, inter alia, says, "I deny that there is anything whatever due and owing by me to said plaintiffs or any other person for said lime and railroad freight for the reason already stated, for the lime was not received by me, nor delivered f. o. b. of the kind, character or quality agreed on between said Francis Phillips and deponent which was to be dry and not water drenched and bleached out lime. The lime arrived in an open iron gon-

dola car and was a solid mass," etc. The foregoing quotations from the pleadings show that each side made fully known to the other what it would undertake to prove as its version of the contract, and thereby each became respectively entitled to offer evidence in support of its own version. And as the defendant's evidence supports his statement of the terms of the contract, it was entirely proper for us to affirm the fourth point of the defendant.

AND NOW November 8, 1920, the motion in arrest of judgment and for a new trial is overruled, and the Prothonotary is directed to enter judgment in favor of the defendant upon payment of the jury fee.

Estate of Charles D. Kaier

Power of executor to sell real estate - Order of court to sell.

It is the duty of an executor who is given power to sell real estate to proceed to make sale of the same when the time has arrived for the power to be exercised and, ordinarily, no application to the court is necessary and if such application is made, the order should be refused unless there are special circumstances which would warrant the court in intervening.

Petition for order to sell real estate. O. C.

T. H. B. Lyon, D. W. Kaercher and A. D. Knittle for petition.

E. D. Smith, J. H. Garrahan and J. F. Whalen, contra.

WILHELM, P. J., December 13, 1920.

This is the application of Charles F. Kaier, surviving executor of the last will and testament of Charles D. Kaier, for a decree authorizing, directing and empowering the petitioner to sell and dispose of, at public sale, all the real estate enumerated, mentioned and described in said pe-

tition, because, the petition shows, that the estate of the said Charles D. Kaier, cannot be settled and distribution made, without conversion of said real estate for distribution.

If the reason set out in the prayer of the petition, to wit: that the real estate should be sold by the executor for the purpose of distribution, was the only moving cause to obtain the order of sale, the petition should be dismissed without much discussion, because it is well established that the court has no authority to order the sale of real estate for the single purpose of distribution.

The petition contains a copy of the will of Charles D. Kaier in which authority for the sale of his real estate is given in the following language. "I do hereby give and grant to my executrix and executors hereinafter named, full power and authority to grant, bargain and sell, at their discretion as to time, manner and terms, any and all real estate of which I may die seized, possessed, or in any manner entitled to, and the same to convey by good and sufficient deed or deeds to the purchaser or purchasers thereof. And lastly, I nominate and appoint my wife, Margaret C. Kaier, my son Charles F. Kaier, and my son-in-law, Michael J. Haughney, to be executrix and executors, of this, my last will and testament."

Under this authority contained in the will, the executor is given by the thirteenth section of the Act of 1834, P. L. 73, full authority to make this sale, in the following language:

The executors of the last will of any decedent, to whom is given thereby, a naked authority only to sell any real estate, shall take and hold the same interest therein, and have the same powers and authorities over such estate, for all purposes of sale and conveyance, and also of remedy by entry by action or otherwise, as if the same had been thereby devised to them to be sold, saving always, to every testator, his right to direct otherwise."

Under the first section of the Act of 12 March, 1800, 3

Smith, 433, the surviving executor is empowered to sell and convey real estate as fully and completely as he, she, or they together with his, her or their co-executor or co-executors would be empowered to do if he, she or they were still living.

A rule was granted upon the parties in interest to show cause whether or not the petitioner should be permitted to sell at public sale the real state mentioned and described in the petition. Two answers were filed to this rule, in which the authority of the court to make an order directing the sale of real estate appears to be raised, and this brings us to the important question in this proceeding, that is, where a power to sell real estate is given to the executor by the will, does the court have authority to direct the execution of that power upon the application of the executor?

Strange to say no case has been cited, neither have we been able to find a case in which this question has been considered and decided.

The twelfth section of the Act of 1834 provides: that all powers relating to real estate contained in a will and no person named to execute the powers, shall be deemed to have been given to the executors, who shall exercise the same only under the direction and control of the Orphans' Court, but the thirteenth section of said Act directs where a naked authority to sell is given to an executor, he shall have power and authority over such estate for all purposes of sale and conveyance, and the executor is unshackled in his execution of that authority. It is said in Woods Estate 1 Pa. 388: "It is best for the Orphans' Court when a testator does not prescribe the manner of selling land, to leave it to the discretion of the executor, and on the return of sale to correct anything that has been done amiss.

We find in Schwartz's Appeal 168 Pa. 204: "There is no express grant of power to the orphan's court which will support the decree asked for, and it cannot be sustained as an incidental power. Even a court of general equity jurisdiction does not possess the power here invoked. No decree

can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power as in the case of a sale under a will directing a conversion but not saying by whom it shall be made. In other cases the decree of the court would add nothing to the efficiency of the power if properly exercised, nor give it validity if improperly exercised."

Judge Vosburg, in 8 Lackawanna Legal News, page 107, in considering a petition asking for an order on the executor to deliver a deed after sale made in pursuance of authority in the will to sell real estate said: "The application to the court is in the form of a petition to compel the executor to execute a deed, and as such a proceeding is very unusual, we find much difficulty in discovering any precedents to guide us in the determination of this unfortunate controversy." He also said, that the Orphans' Court has power, where justice requires it to compel an executor to deliver a deed, or in proper case to sustain his refusal to do so, but this jurisdiction should be exercised along the lines and subject to the rules of judicial procedure. And in reply to the contention that there should have been some precedent application by the executor to the court, before making sale, Judge Vosburg was of the opinion that the power in the will gave the executor ample authority to make the sale, therefore, any application which the executor might have made for an order of sale would have been refused on the ground that the Orphans' Court has no advisory jurisdiction.

In Mulley's Estate, 10 Luzerne Legal Register Reports, 523, the executor presented a petition to the court authorizing him to accept an offer for the private sale of the personal property and real estate of his decedent. The court refused to make the order, because the petitioner derived ample power and authority from the will to dispose of the real estate and personal property without an order. The court

said: We are unable to find any authority which would permit us to grant the order prayed for. The executor in this case derives his power to sell from the law acting upon the will, and not from the court, and it is only where an abuse of discretion is imminent that the court will interfere.

In Rogers Estate 185 Pa. 428, the Supreme Court said that the lower court was entirely right in granting an order for the sale of real estate, although the power of sale was conferred upon the executors and trustees by the will. A reading of this case will show that the petition for sale was presented by the legatees under the will and the order for sale was not resisted by the executors and trustees, who with the petitioners comprised all of the parties in interest in the estate. It appears that the executors were willing to make the sale, believing it was for the best interests of the estate that a sale should be made, but declined to offer to sell, because of doubt of their powers to do so under the will. This proceeding really was in the nature of a family agreement and settlement which is always favored by the courts, and was in harmony with the wishes of all the interested parties, and we have no doubt the conclusion there reached was based upon the particular facts contained in the case as above related. In fine its effect was somewhat similar to a proceeding under the act of 1893 which is known as the short proceeding in partition.

It is the duty of an executor who is given power to sell real estate to proceed to make sale of the same when the time has arrived for the power to be exercised, and ordinarily no application to the court is necessary, and if such application is made, the order should be refused unless there are special circumstances which would warrant the court in intervening.

In this case no facts were set down in the petition or answers that would justify the court in interfering with the authority reposed in the executor by the will to sell at his "discretion as to time, manner and terms any and all real estate which the testator died seized, possessed or in

any manner entitled to." Therefore the court should not intervene in the exercise of that full discretion, neither should the court assume to advise the executor in advance and by the way of anticipation concerning his power of sale given to him by the will because such advise would not be binding upon the parties. *Mulley's Estate* 10 Kulp 523.

AND NOW DECEMBER 13, 1920, the petition is dismissed.

Shifferstine et al. vs. Sitler et al.

Public officers—Collector of taxes—Principal and surety—Judgment—Auditor's finding not appealed from.

Where auditors find a sum stated due by a collector of taxes of a school district, and, on appeal from this finding, judgment is entered against him, from which judgment no appeal is taken, and an action on his bond is brought more than six months after the judgment was entered, such judgment is conclusive of the liability of the sureties on the bond.
Supreme Court.

Assumpsit on bond of collector of taxes of school district. Before KOCH, J.

The court gave binding instructions for plaintiffs.

Verdict and judgment for plaintiffs for \$10,7000. Defendants appealed.

J. O. Ulrich, for appellants.

Arthur L. Shay, for appellees.

Per Curiam, June 26, 1920:

This action is on the bond given by C. E. Sitler as collector of taxes for the school district of the Borough of Tamaqua. The auditors of the district found there was due from him to it the sum of \$13,771.20, and, on his appeal from this finding, judgment was entered against him in the court below, on December 10, 1917, for \$9,554.36. No appeal was taken from this judgment, and in this action,

brought upon Sittler's bond more than six months after the judgment was so entered against him, it was conclusive of the liability of the sureties: *Pittsburgh Wagon Works Est.*, 204 Pa. 435. A verdict having been properly directed against the appellants, the judgment on it is affirmed.

Smith vs. Philadelphia & Reading Railway Co.

Workmen's compensation— Railroads— Death— Interstate or intrastate commerce— Master and servant— Referee's findings— Evidence— Burden of proof— Appeal.

Where compensation awarded against a railroad company by a referee to a wife for the death of her husband, was resisted by the company on the ground that at the time of the death of the decedent, he was in its employ in connection with its interstate commerce business, the burden was upon the company to show this before the referee.

If the referee decides that the burden was not met, and makes a finding from which the court of common pleas cannot determine whether the deceased was, or was not, engaged in interstate commerce, the referee's award in favor of the widow will be sustained by the Supreme Court.

Supreme Court.

Appeal from decision of the compensation board reversing award of the referee in favor of claimant. Before BERGER, J.

The court below reversed the decision of the compensation board and affirmed the award of the referee in favor of the widow. Defendant appealed.

George Gowan Parry, for appellant.

Roscoe R. Koch, and Frank P. Krebs, for appellee.

Per Curiam, April 12, 1920:

Payment of the compensation awarded to the appellee for the death of her husband is resisted by the appellant on the ground that at the time of his death he was in its

employ in connection with its interstate commerce business. The burden was upon it to show this before the referee: *Hench v. Penna. R. R.*, 246 Pa. 1; *Murray v. Pittsburgh, C., C. & St. L. R. R.*, 263 Pa. 398. Upon the facts as found by the referee he held that the appellant had not met the burden which was upon it. This was reversed by the compensation board, and its action was subsequently reversed by the court below in affirming the award of the referee. The judgment is affirmed on the following from the opinion of the court below directing it to be entered on the award of the referee, for we can say nothing more: "From the findings of the referee we are unable to determine whether the deceased at the time of his injury was engaged in flagging the crossing for the passage of the train engaged in interstate commerce, or for the passage of the engine engaged exclusively in intrastate commerce."

Judgment affirmed.

Glebus's Estate

Wills— Revocation— Nuncupative will— Act of April 8, 1883, P. L. 219.

Declarations by a party on his deathbed as to disposition of his property, with directions to secure a scrivener, cannot operate as a nuncupative will; the desire indicated was rather the disposition of his property by a written instrument.

A will drawn by testator's attorney and duly executed in the presence of two witnesses, will not be revoked by the expressed desire of the testator, where it appears that the testator stated his desire to change his will so as to give his estate to his two children by his divorced wife; that he directed that some one be sent for to draw a new will; that he persisted for twenty-four hours thereafter in such desire until he became unconscious and shortly afterwards died; that diligent efforts were made by his divorced wife to secure a scrivener; that testator asked her and a friend of such wife to be "dependable witnesses;" and that five days elapsed, after testator's death, before an alleged nuncupative will, of which the divorced wife was one of the witnesses, was reduced to writing.

Such a writing, even if it were a nuncupative will, could not be held to revoke the previous will, in view of the Act of April 8, 1883, P. L. 249, which expressly provides that a prior will can be revoked by a nuncupative will only when the latter is "committed to writing in the lifetime of the testator, and after the writing thereof is read to or by him, and allowed by him, and proved to be so done by two or more witnesses."

Supreme Court.

Appeal from decision of register of wills refusing to admit to probate an alleged nuncupative will.

The court dismissed the appeal, in an opinion by WILHELM, P. J., 15 Sch. Leg. Rec. 210. Annie Sinkiewicz appealed.

G. F. Brumm, George Dyson, William Durkin and James B. Reilly, for appellant.—It is clear that testator wanted to change his written will and to bequeath his personal estate to his children, at least at one time during his last illness, and did all that he could do to accomplish it.

As to the manner and the words used in attempting to do so, they stand uncontradicted by any evidence; nor was an attempt made to do so.

All the requisites of the statute were fulfilled.

Whether or not testator believed that his will would have to be reduced to writing to make it valid, is absolutely irrelevant, and, besides, he said in fact that "if no one would sign," it was to be his will.

A nuncupative will to repeal a written will does not have to be committed to writing in the lifetime of the testator, and read to or by him and allowed by him.

Daniel J. Ferguson, for appellee.—A will in writing cannot be revoked by a nuncupation or any mere words: Act of April 8, 1833, P. L. 250.

The written will of Joseph Glebus, now on probate in the register's office, was never revoked by the testator: Evan's App., 58 Pa. 238; Clingan v. Mitcheltree, 31 Pa. 25; Heise v. Heise, 31 Pa. 246; Lewis v. Lewis, 2 W. & S. 455.

A declaration of intention to revoke, is of no effect: Shippler's App., 3 Penny. 272; Rife's App., 110 Pa. 232; Munhall's Est. 234 Pa. 169; Jacoby's Est., 190 Pa. 382.

There was no nuncupation in the case at bar, as the evidence in this case does not measure up to the requirements of the statute and the safeguards provided by decisions of the higher courts: Shover's Est., 258 Pa. 70; Haus v. Palmer, 21 Pa. 296; Porter's App., 10 Pa. 254; Rutt's Est., 200 Pa. 549; Taylor's App., 47 Pa. 31; Wiley's Est., 187 Pa. 82; Butler's Est., 223 Pa. 252; Mellor v. Smyth, 220 Pa. 169; Boyer v. Frick, 4 W. & S. 257; Werkheiser, 6 W. & S. 184; Stricker v. Groves, 5 Wh. 386.

BROWN, C. J. April 12, 1920.

On March 21, 1917, Joseph Glebus executed, in the presence of two subscribing witnesses, a will drawn for him by his attorney. His estate consisted of about \$6,000 in personalty, and, after providing for his funeral expenses and burial and making a bequest to a friend, he divided the balance of his estate equally among fourteen named legatees. Early on the morning of the next day—March 22d—the testator expressed a wish to change his will by giving his entire estate to his two children, from whose mother he had been divorced, and he directed that someone be sent for to

draw a new will. He persisted, during March 22d, and up to eleven o'clock the next day, in his desire to dispose of his estate by another written will, but unsuccessful efforts were made to secure a scrivener, and, on March 23d, shortly before noon, he lapsed into unconsciousness, dying several hours later. A caveat was filed against the probate of the will executed March 21st, but the register allowed it to be proved and issued letters testamentary to the executor appointed by the testator. From this action an appeal was taken to the orphan's court. Subsequently what was alleged to be a nuncupative will of the decedent, made March 22, 1917, was offered for probate, but the register refused to receive it. From this an appeal was also taken to the court below, which held that the written will of the deceased had not been revoked and stood as the final disposition of his estate. On this appeal the question for determination is, Did the decedent make a nuncupative will which revoked the written one? The court below, from testimony submitted on the appeals from the decrees of the register, found that the decedent had not made a nuncupative will. Its finding was that he had merely expressed a wish to make a written disposition of his estate, different from that made by his will of March 21st, and that his expressed wish as to this had not been carried out. This correct view is thus expressed by the learned president judge of the court below: "At first glance it may seem that the alleged statement of Joseph Glebus as to the disposition of his property, and the calling upon his divorced wife and her friend to be 'dependable witnesses,' effected a disposition of his property by nuncupative will, but when it is remembered that the alleged declarations were followed by directions to secure a scrivener, how can it be said that Joseph Glebus made a nuncupative will? If the testimony of the proponents of the nuncupative will is to be believed, he expressed a desire as to how he wished to dispose of his property by means of a written instrument, and he continued and persisted in that desire for more than twenty-four hours after the alleged

nuncupative will was made. One of the witnesses to the nuncupative will, his divorced wife, was most active in her efforts to secure a scrivener so that a new will containing the last intention of the testator as to the disposition of his property could be reduced to writing. How, under these circumstances, can it be said that Joseph Glebus intended by his declarations to dispose of his estate by a nuncupative will?"

But even if the decedent had actually made a nuncupative will, what effect would it have had on the written one? The answer to this is found in the Act of April 8, 1833, P. L. 249, which was in force at the time of the decedent's death. Section 14 of that act provides: "No will in writing concerning any personal estate shall be repealed, nor shall any bequest or direction therein be altered, otherwise than as is hereinbefore provided in the case of real estate, except by a nuncupative will, made under the circumstances aforesaid, and also committed to writing in the lifetime of the testator, and after the writing thereof read to or by him, and allowed by him, and proved to be so done by two or more witnesses." The written will of the deceased made a valid disposition of his estate. The alleged nuncupative will, upon which the appellant relies as a revocation of it, was not reduced to writing until five days after the testator's death, and the contention that it revoked his written will can hardly be given serious consideration, in view of the clear statutory provision as to how, and how only, a nuncupative will can revoke a written will disposing of a testator's estate.

Appeal dismissed at appellant's costs.

Shuman vs. North Union Township

Negligence— Townships— Roads— Defective road—
Contributory negligence— Nonsuit— Failure to exercise
senses— Warning— Notice.

The driver of a wagon, or other vehicle, is required, at all times, in the exercise of due care, to make use of all his faculties when engaged in traveling along a public highway, to discover dangers. He must, at certain places pause to afford his faculties full play that he may better protect himself; when he has reason to suspect from the condition of the highway or an unusual disturbance of his vehicle, or team, that a danger exists, or something is wrong with the highway, it is his duty to stop his vehicle, and investigate. If, notwithstanding the warning given by the ordinary use of his faculties, or the condition of his vehicle, he persists going forward, the municipality will not be liable for any injury that may befall him.

In such a case the plaintiff was guilty of contributory negligence, as he did not use his faculties as the law requires, either in looking, feeling or appreciating difficulties plainly patent to an ordinary person. He should have seen the diverging roads and separating horses, and noticed the tilting of the wagon, and taken precaution accordingly.

Supreme Court. Affirmed.

Trespass for personal injuries. Before BERGER, J.

The court entered a compulsory nonsuit which it subsequently refused to take off. Plaintiff appealed.

M. M. Burke and G. W. Moon, for appellant.—The case was for the jury: *Cohen v. P. & R. R. R.*, 211 Pa. 227; *Muckinhaupt v. Erie R. R.*, 196 Pa. 213; *Menner v. D. & H. Canal Co.*, 7 Pa. Superior Ct. 135; *Musselman v. Hatfield Boro.*, 202 Pa. 489; *Hugo v. R. R.*, 238 Pa. 594; *Goff v. Phila.*, 214 Pa. 172; *Sprowls v. Morris Twp.*, 179 Pa. 219; *Hogan v. West Mahanoy Twp.*, 174 Pa. 352.

Edmund D. Smith and Roy P. Hicks, for appellee.—Plaintiff was guilty of contributory negligence: *Myers v. B. & O. R. R.*, 150 Pa. 386; *Coolbroth v. P. R. R.*, 209 Pa. 433; *Baker v. West Moreland Nat. Gas Co.*, 157 Pa. 593; *Warner v. Peoples St. Ry.*, 141 Pa. 615; *Auberle v. McKeesport City*, 179 Pa. 321; *Fetterman v. Rush Twp.*, 28 Pa. Superior Ct. 77.

The facts of the case at bar are almost identical with

those in *Mueller v. Ross Twp.*, 152 Pa. 399; See also *Conrad v. Augusta Twp.*, 200 Pa. 337.

KEPHART, J., March 22, 1920.

Plaintiff, on a dark night, was traveling along a highway with which he was familiar, and knew that improvements had recently been made thereon. Under his huckstering wagon, there was attached a lantern to locate the feet of the horses, the ground around them and some distance ahead of the team. As he drove along, he came to a place where the old road was being reconstructed by having its grade reduced. This was accomplished by building a new road parallel thereto and lower down. The new road fell off quite rapidly from the point of intersection with the old road, as the latter had a very steep grade,— at 30 feet from the intersection the difference in elevation was four feet or more. At the time of the accident, the work was about completed, and, on reaching the intersection of the roads, his horses, in selecting a road on which to travel, took different routes, one taking the high road and the other the lower road, and the wagon, traveling partly on the high road and partly on the lower road, reached a place where it fell over, injuring the plaintiff. There was no barrier at the intersection, though one had been placed a short distance from it; some witnesses place it at 19 feet, others at 30, but as there was sufficient space between the barrier and the top of the slope on which a horse might walk on the old road, the exact location of the barrier with relation to the junction is immaterial, under the circumstances. There is some dispute as to the place where the accident happened. This, too, is unimportant, assuming the evidence in its most favorable light to plaintiff. He was still guilty of contributory negligence. The driver of a wagon, or other vehicle, is required, at all times, in the exercise of due care, to make use of all his faculties when engaged in traveling along a public highway, to discover dangers. He must at certain places pause to afford his faculties full play that he may better protect himself; when he has reason to suspect, from the

condition of the highway or an unusual disturbance of his vehicle, or team, that a danger exists, or something is wrong with the highway, it is his duty to stop his vehicle and investigate. If, notwithstanding the warning given by the ordinary use of his faculties, or the condition of his vehicle, he persists in going forward, the municipal authorities will not be liable for any injury that may befall him. The law will not condone his failure to make use of the faculties nature gave him. When the evidence brings a case within these rules, plaintiff is adjudged as not acting as an ordinary prudent person would act, and the law will leave him in the condition his careless acts place him. As plaintiff came to the intersection and looked ahead with the aid of the lantern, he could have seen the diverging roads, they being so close together and the elevation so acute; as the horses separated there, it was more pointedly brought to his attention. When he entered the two roads, he must have seen the one horse as it advanced rising above the other, first a foot, then two feet, and four feet, when it fell. If he did not see this, he must certainly have observed the other horse further down, for, if the rays of his lantern furnished any light, as he says it did, one or the other of these conditions must have presented itself. If he failed to notice these conditions, at least he must have observed something wrong with the seat of his wagon; it began to tilt when it entered both roads, the one side going higher and higher, until one side was two or three feet higher than the other. The first few feet of the wagon's entry on the two roads should have developed the difficulty. Nothing was done to check his team, which was traveling very slowly, and if plaintiff knew of these conditions, as he certainly must have known, it was his duty to stop and investigate. He did not use his faculties as the law requires, either in looking, feeling, or appreciating difficulties plainly patent to an ordinary person. We need but call attention to the case of *Myers v. B. & O. R. R. Co.*, 150 Pa. 386; *Warner v. Peoples St. Ry.* 141 Pa. 615, 620; *Auberle v. McKeesport*, 179 Pa. 321, 325-6;

Mueller v. Ross Twp., 152 Pa. 399, for a discussion of the several principles herein mentioned.

The judgment is affirmed.

Breisch et al., vs. Locust Mountain Coal Co. et al.

Mines and mining— Highways— Removal of coal under highway— Right of abutting owner— Nuisance— Agreement with supervisors.

An owner of land abutting on a highway may use the land for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage that may be derived therefrom.

An abutting owner owning coal under a public highway has the right to mine and remove it, but the removal must be done in such manner as not to injure the surface of the highway, or create a condition whereby injury may follow later.

A coal company acquired no right to interfere with the surface of a public highway for the purpose of mining coal, under an agreement with the highway supervisors or their attorney that another road should be provided by the company, inasmuch as an encroachment or obstruction was a nuisance per se which could not be legalized unless the highway was vacated in the manner provided by law; nor can laches be imputed to the Commonwealth under the circumstances of the case; and occupancy of the property inconsistent with the public rights, is a public nuisance; and no length of time will legalize a public nuisance.

A public highway is the property of the people of the State and the public rights cannot be lost by nonuser or by municipal action not expressly authorized by law.

Where a coal company has wrongfully mined under a public highway, the supervisors as municipal authorities are the proper officers to ask for a compulsory mandate to redress the injury.
Supreme Court.

Bill in equity to enjoin defendant from excavating coal in highway. Before BERGER, J.

E. P. Leuschner, for appellants.—It is competent for a municipal corporation to prosecute a bill in equity, where the injury is an immediate one to the property of the corporation, as obstructions to a public highway in the munici-

pality common to the corporators, and the citizens of the Commonwealth generally: Com. v. Long, 1 Parsons 143; Harvey v. L. B. R. R., 47 Pa. 428; Mint Realty Co. v. Wanamaker, 231 Pa. 277.

No usage, however long continued, will justify an encroachment great or small on a public highway: Appeal of Phila., 78 Pa. 33.

Any obstruction to the free use of a highway is a nuisance: Com. v. McNaugher, 131 Pa. 55; Hauck v. Tide-water P. L. Co., 153 Pa. 366; Penna. R. R. Co's. App.' 115 Pa. 514; Com. v. Kembel, 30 Pa. Superior Ct. 199.

H. S. Drinker, Jr., D. W. Kaercher and M. M. Burke, for appellee.

KEPHART, J. May 17, 1920.

It is admitted defendants are the owners in fee of the coal underlying and on either side of the public highway, as it affects the present case. There is nothing to show how Krebs Road originally became a public highway. If, in the original taking, the right of property in any aspect had been injuriously affected, the owner would have been entitled to damages; but, as the ownership of the coal is not in dispute, it is clear that when the road was laid out the owner had full dominion and control over the coal with the right of an absolute owner to it, subject, however, to the easement in favor of the public. He has the right to mine and remove it, but the removal must be done in such manner as not to injure the surface of the highway, or create a condition whereby injury may follow later. The servient estate must always be in such condition that the road may be continued as a highway for the traveling public in the future. From the undisputed facts this servient estate owed to the road above such support as will at all times preserve and keep it from subsiding.

An abutting owner may use the land (the surface) for his own purposes in any way not inconsistent with the public easement and is entitled to all profit and advantage that may be derived therefrom: 13 R. C. L., sec. 107, p. 121. "The

rights and title of an abutting owner * * * * are subject * * * to the easement and servitude in favor of the public, and to the right of the public authorities to occupy the space above and below the surface of the way for any purpose within the scope of public uses to which highways may be put:" 13 R. C. L., sec. 108, p 123. But above and beyond this reasonable use of the public, the owner undoubtedly retains the right to use his land; and so it has been held, where one owns the fee in the minerals under the surface of the highway, and the mines on the surface adjacent thereto, they may work such mines, but must do so in such way as not to cause the road to subside: 17 Eng. Ruling Cases, p. 554.

The coal under the highway could not be removed without disturbing the surface; to mine it the surface itself, which includes the highway, must be physically displaced, stripped so that the coal might be taken out. The company's right to do this was subordinate to the right of the public to the highway. This use, encroachment or obstruction (stripping) by the company was a nuisance per se, which could not be legalized unless the highway ceased to exist as such; in that event, the land reverts to the owners and its use is no longer a public one.

To cause the "land" to revert, the road must be vacated in the manner provided by law, and, as public highways are within the control of the Commonwealth, the statutory directions for their creation and abolishment must be followed. When counsel in this case agreed that the road should be vacated, thus permitting the coal company to continue the nuisance and the public to be deprived of the use of the highway for travel, they clearly exceeded any authority they had as attorneys and they attempted to do something which even the supervisors had no power to do; and the same may be said as to supplying the road vacated. To permit such an evasion of a legislative mandate as to highways would be to create an easy method to have important highways changed to suit the convenience of a few persons without

notice to others interested who might be injured thereby. The Act of 1836 or 1911 should have been invoked.

The supervisors, as municipal authorities, were proper officers to ask for a compulsory mandate to redress the injury. It should not have been denied, as a clear legal right existed. Where there has been an invasion of a public right by the use, for private purposes, of that which belongs to the public, whether the injury be great or small, it is the continuing deprivation of that right which gives cause for equitable intervention to prevent the creation or the continuance of such wrongful exercise. This should be recognized for a broader reason where the injury is substantial and material, calculated not only to interfere with the right and comfort of the public as such, but possibly to the damage of individuals. So it has been held that injunctions to restrain encroachments on highways, though they should be granted with care, will, when public rights are invaded, be granted. In such case no question of the amount of damages is raised, but simply the one of the invasion of a right: *Reimer's App.*, 100 Pa. 182, 187. A nuisance per se, when public in its character, may, upon information by the attorney general, or at the suit of a municipality, be enjoined: *Mint Realty Co. v. Wanamaker*, 231 Pa. 277, 279.

The defendants did not acquire any right to excavate the Krebs Road for the purpose of their stripping operation because of any consent the supervisors of the township might have given, official or otherwise. In Pennsylvania, a highway is the property of the people,—not of a particular district, but of the whole State,—and when a public right has been acquired, it cannot be lost by nonuser or by municipal action not expressly authorized by law. Any occupation of the property inconsistent with the public right is a nuisance, and no length of time will legalize a public nuisance: *Pittsburgh v. Epping-Carpenter Co.*, 194 Pa. 318. While laches may be imputed to the Commonwealth, or its representatives, it is done only in rare cases, as stated by our present Chief Justice in *Bradford v. N. Y. & Penna. Tel. &*

Teleg. Co., 206 Pa. 582. Under the circumstances of this case, appellants lost no right in the prosecution of this litigation. They acted under what they believed to be lawful orders of the court; but defendants will not be heard to complain of this, as they have not met the obligation assumed in the unauthorized agreement and order.

The decree of the court below is reversed and a mandatory injunction is directed to issue as prayed for, and, owing to the peculiar circumstances caused by the orders of the first judge who heard the case, the issuance of the writ to be withheld for a period of six months, pending which time appellee may institute proper proceedings to have Krebs Road vacated and supplied, if it is thought proper so to do; or within which time the parties may, under the Act of 1911, change the location of the road as therein provided, on the conditions stated in the act, that the cost and expense should not exceed the sum of \$300. This would not limit the amount respondents may decide to pay in order to accomplish the result. If the proceedings as instituted are prosecuted with due vigor, but are uncompleted at the end of the six months, the court below, in its sound discretion may grant a further extension of time.

The decree is reversed at the cost of the appellees.

Bartolet v. William G. McAdoo, Director Gen. of Railroads

Negligence— Railroads— Fires— Sparks— Proximate cause.

In an action against the director general of railroads for damages caused by the burning of a barn, it appeared that according to the evidence of the plaintiff, a fire was discovered by defendant's employees in the plaintiff's field at a point 75 to 90 feet from the tracks. After the fire in the field had been extinguished another in a barn about 420 feet from the defendant's right of way and across a public road was discovered. There was no affirmative evidence that the fire from the field was communicated to the barn, and it was not contended that sparks reached the barn directly from the engine passing 420 feet away. Under such circumstances, the negligence of the defendant was not the proximate cause of the burning of the barn, and it was not error for the lower court to enter judgment non obstante veredicto.

Superior Court. Affirmed.

KELLER, J., dissents.

Trespass to recover damages for the burning of a barn.
Before BECHTEL, P. J.

The jury rendered a verdict in favor of the plaintiff for \$1,400. Subsequently the court entered judgment for the defendant non obstante veredicto. Plaintiff appealed.

J. W. Moyer and G. H. Gerber, for appellant.

Otto E. Farquhar, for appellee.

LINN, J., February 28, 1920:

The single assignment of error complains that the court entered judgment for defendant notwithstanding the verdict for plaintiff, in a suit brought to recover damages resulting from the destruction of a barn or hay shed by fire alleged to have been caused by sparks emitted by the negligent operation of defendant's locomotive. The court followed *Railroad Co. v. Kerr*, 62 Pa. 353, saying after a long discussion of the subject: " * * * since it has been held that the authority of that case has not been impaired on the facts contained therein, we feel constrained to apply the rule there

laid down to the facts in this case."

It appeared that on the afternoon of a clear, dry windy day, just after defendant's passenger train passed plaintiff's farm, a fire was observed by defendant's employees in plaintiff's field at a point from 75 to 90 feet from the tracks. The wind was blowing from the track across the field. This fire was extinguished by defendant's employees after an area of about three acres was burnt over. The barn, 420 feet from defendant's right-of-way, was from 50 to 75 feet from the edge of the burnt area and was separated from it by a public road. After extinguishing the fire in the field, the employees started home, when one of them turned around and saw that there was fire on the barn. One of plaintiff's witnesses was asked: "Q. Do you know what started the barn to burn? What started the barn to burn?"

A. Which place it started, you mean?

Q. Yes. What caused the barn—what made the barn burn?

A. I don't know that.

Q. You don't know? Wasn't it the wind carrying the sparks?

A. I can't tell that.

Q. From the field to the barn?

A. I can't tell that the wind carry the sparks to the barn, I can't tell that because I no see."

The engine in passing "would be going down a small grade" and stopped at a station about three quarters of a mile away. Another of plaintiff's witnesses testified with regard to the train that "they were coming down grade and were shut off to make the stop at the station." He also testified as follows:

"Q. Did you see this train as it passed Bartolett's field?

A. Yes, sir.

Q. How was it being operated then? Was it puffing hard or pulling hard?

A. No, sir; it was shut off.

Q. Shut off?

A. Coming down grade, shut off.

Q. Coming down grade, just drifting along easy, drifting along without making any noise?

A. Yes, sir.

By Mr. Gerber: Q. Where was it shut off?

A. On the bridge.

Q. How do you know?

A. My work required me to watch the train approaching."

Another of plaintiff's witnesses testified that "it was a minute or two" after the fire in the field was extinguished before he discovered the fire on the barn or shed.

Plaintiff produced evidence that shortly after the train passed, three other fires were found burning near the right-of-way within a mile and a half on either side of appellant's farm. Defendant recalled a witness, one of its employees, who had been called by plaintiff, who testified that he saw the train drifting past appellant's field, and who said "You don't see smoke or steam when the train is drifting, especially down that grade there." Defendant also called an inspector who said that he had inspected the spark arrester on this engine on the evening of the day of the fire and that it was in good order and such as was in general use. The engineer of the train testified that in passing appellant's farm, his "engine was shut off." Excepting the railroad employees, no one was seen in the neighborhood at or shortly before the fire in the field was first observed.

The case was tried on the theory, as the court below stated, "that a spark from the engine ignited the grass and that a spark from the grass in turn ignited the roof of the barn and that the fact that the field was ignited at a distance of about 75 feet from the defendant's right-of-way shows that either the engine of the defendant company was not equipped with a proper spark arrester or that it was negligently operated." None of the witnesses saw the engine emit sparks or anything else as the train passed appellant's farm when the "engine was shut off" and the train

was "drifting * * * * * down that grade there," nor did appellant offer anything concerning the condition of the spark arrester; he contends that because these fires were seen near the right right-of-way shortly after the train passed, a presumption arises that the fires came from the engine and that the negligence alleged may be inferred from that unusual occurrence. Assuming for the moment that he may so fix responsibility for the fire in the field which had been extinguished, of what use is that inference or presumption in ascertaining the cause of the fire to the barn? The theory of the trial, as has been stated, was that a spark from the engine ignited the field and then a spark from the field ignited the barn, but there is no evidence that any one saw sparks or fire communicated from the burning field to the barn. In that respect the case differs from Kerr's case (*supra*), where there was evidence that the fire was communicated from the warehouse to Kerr's hotel, yet it was held that the succession of events following the operation of the engine lacked such entirety as would justify the conclusion that the legal or probable cause of the burning of the hotel was the operation of the engine; all the more must that be true in this case where there is no affirmative evidence that fire from the field was communicated to the barn, and where it is not contended that sparks reached the barn directly from the engine passing over 400 feet away; it would be mere presumption on presumption, as to which see *Railroad Co. v. Henrice*, 92 Pa. 431 at 434, and *Welsh v. Railroad Co.* 181 Pa. 461 at 464.

The judgment is affirmed.

Dissenting Opinion by KELLER, J.:

There was evidence that after a certain engine belonging to the defendant had made its trip, fire broke out within a few minutes in the adjoining fields at four different places, located within a distance of about three miles. It started in the plaintiff's field about seventy-five feet from the track and helped by an unusually strong wind, in a few minutes had burnt about three acres of grass. The wind was in the

direction of plaintiff's barn and sparks from the field were flying with the wind. The fire in the field was just out when the defendant's employees noticed a small fire burning on the shingle roof of plaintiff's shed across the road and from fifty to seventy-five feet away. This was within twenty minutes from the time the fire was first seen in the field. The plaintiff's family was not at home and there was nothing which could have caused the fire but the sparks from the burning field. The learned trial judge left the disputed facts in the case, including the question of proximate cause, to the jury and their verdict resolved any doubt as to them in favor of the plaintiff. In my opinion, the jury was justified in finding that the fire in the field and its communication to the barn was a continuous succession of events, so linked together that it became one natural whole and constituted one continuous conflagration. The case is distinguishable in its facts from *Penna. R. R. Co. v. Kerr*, 62 Pa. 353, and is governed rather by *Penna. R. R. Co. v. Hope*, 80 Pa. 373; *Oakdale Baking Co. v. P. & R. Ry. Co.*, 244 Pa. 463; and *Cook v. P. C. C. & St. L. Ry. Co.*, 251 Pa. 198.

I would reverse and enter judgment on the verdict.

Estate of Catharine Hildenbrand, Deceased.

Decree of distribution - Judgment of the Orphan' Court Opening.

A decree of distribution in the orphans' court is as solemn and binding as judgment in any other court of record.

The procedure to open judgments is well established by law and long practice and must be followed.

Petition to pay share on distribution. O. C.

James A. Somers, for petition.

WILHELM, P. J. January 17, 1921.

On April 12, 1920, a decree of distribution was filed, awarding to the Estate of Bertram Hildenbrand the sum of \$486.40 out of the estate of Catharine Hildenbrand, deceased, in pursuance of the audit of the account of Jacob Hildenbrand, the executor of her last will and testament.

No exceptions were filed to this decree of distribution, but on or about the eighth day of November last, the petition of Elizabeth A. Hildenbrand, widow of Bertram W. Hildenbrand was presented to the court in which it was set out that the real estate of Catharine Hildenbrand was sold for the payment of debts, and the surplus from said sale, after the payment of debts, was the subject of distribution referred to in the petition, and that more than one year has elapsed since the death of Bertram W. Hildenbrand, the distributee, therefore, the court is asked to direct Jacob Hildenbrand to pay the share of Bertram W. Hildenbrand to the petitioner and the guardian of the minor child of Bertram W. Hildenbrand in equal shares.

The decree of distribution filed April 12th., 1920, is a judgment entered in the orphans' court of Schuylkill County, and is as solemn and binding as judgments in a court of record always are. The procedure for opening judgments is well established by law and long practice and the method adopted for opening this judgment is not in accordance with our practice in this State.

AND NOW JANUARY 17, 1921, the petition is dismissed.

Estate of Margaret Sheetz

Statement of account - Blending of administration and distribution.

Where an account mingles principal, income, personal property and real estate confirmation will be refused.

O. C. No. 12, November Term, 1920.

Carl Wagner for accountants.

Cyrus M. Palmer for exceptants.

WILHELM, P. J. January 24, 1921.

Audit of the Third and Partial Account of Benjamin Franklin Sheetz, William Stratton Sheetz and Horace B. McCool, executors under the last will and testament of Margaret Sheetz, late of the City of Pottsville, County of Schuylkill, and State of Pennsylvania, deceased.

This account came on for audit on the 23rd day of November, 1920, and some testimony was taken in support of exceptions filed on the part of certain legatees. The first exception reads as follows: "Said accountants have not stated the said account in accordance with law or in the manner required by this court, in that they have blended principal, income and distribution in one account.

This exception is well founded, because the account as stated is unintelligible when we come to consider the complaint contained in the second exception, which covers the matter of commissions charged by the accountants. The debit side of the account includes items of rent received to an amount in excess of \$8000.00, real estate sold to the amount of \$75000.00, and the first item on the debit side reads as follows: "Nov. 15, 1917, balance per account filed \$61.55" without any explanation as to whether it is principal or income, rent, or the proceeds of the sale of real estate. This method of stating the charge side of an account has been so frequently condemned by the courts that it should not be overlooked or disregarded. The method of

stating the items on the credit side of the account is open to no less criticism than that directed toward the debtor items because we have here the blending of administration and distribution included with items of principal and income together with the mingling of personal property and real estate, thereby working a violation of almost every rule laid down by the courts covering the method of stating accounts; notable the charging of executors commission in lump sum so that it cannot be ascertained what charges are made against income or against principal or against sale of real estate.

If this account is correct a large sum of money has been paid out to Nettie E. Duby in clear disregard of the terms of the will, which item as well as other items of distribution have been included in the discharge account mingling principal, income, personal property and real estate. For the reasons stated this account should not be confirmed.

AND NOW JANUARY 24, 1921, confirmation is refused.

Estate of Maria Reed, Deceased.

Method of stating an account - Purpose of an account - Verification. Act of April 9, 1915, P. L. 72.

A properly stated account should in the first instance contain the principal debit items, followed immediately by the discharges claimed, and if another account is embraced within the paper, it should be separately stated in a like manner. Any other method of stating accounts should not be approved. Mingling of administration and distribution in an account is in violation of our well-established practice.

The filing of an account by a fiduciary is in the nature of a petition to a court of record alleging matters of fact; its ultimate purpose being to secure the approval of the court of its contents by setting out in detail the acts of the fiduciary performed in his official capacity; and the court should not receive or consider the account unless the same is duly verified.

Audit. No. 20, November Term, 1920, O. C.

G. E. Gangloff, for accountant.

WILHELM, P. J. January 3, 1921.

This account came on for confirmation and audit, and confirmation should be refused, because the account is not in proper form, and not intelligible in that many items of discharge are not clearly stated, and it is not clear in other respects. It is headed "Account of The Schuylkill Trust Company, Trustee," under which appear the words "Maria Reed." While one could presume that this is an account of The Schuylkill Trust Company, Trustee for Maria Reed, it is not so stated, and I know of no excuse for this economy of language, or why it should not be stated under what authority The Schuylkill Trust Company became trustee, whether under the will or an appointment by the court or otherwise.

While the account purports to contain a principal account and an income account, the two accounts are so mingled in the balances struck that it amounts to a statement of income and principal without distinction.

It appears by an analysis of the items of the account that the amount of the principal received was \$672.55, and the amount paid out by the trustee on account of principal was \$47.73, and that there is a balance of principal remaining in the hands of the accountant of \$624.82, and no item of this amount appears in the account, and it can only be arrived at by calculation.

The income account shows that there has come into the hands of the trustee as income \$572.11, but in this charge of income the trustee undertakes to take credit for administration expense, which is improper and not the manner in which accounts should be stated. On the discharge side of the income account administration and distribution items appear to be mingled in clear violation of the well established rules for the stating of accounts, and the items of discharge amount to \$539.56, which leaves a balance of income in the hands of the accountant of \$32.55 and if there is de-

ducted the commissions claimed by the accountant, which only appear on the debit side of the account, to wit, \$28.55, there is a balance of \$4.00, and this balance appears nowhere in the account.

In fine this account appears to have been hastily drawn, and instead of being a properly stated account seems to be a copy of the books of the Trust Company, which may be intelligible to the company in many of the items of discharge in the income account, but is certainly not such an intelligible statement of the affairs of this estate that ought to appear in an account. All accounts, whether prepared by a Trust Company or an individual, should be stated and prepared in the well-established and universally approved form; and the manner in which books are kept by the accountant should not excuse a departure from a practice so generally recognized and followed.

This account properly stated should contain the principal charge account, followed immediately by the discharges claimed, with a balance struck; and the income account should likewise contain the charges followed by the discharges claimed with a balance set out. And any other method of stating the account should be disapproved. The mingling of administration and distribution should be avoided.

It is found also that this account contains no affirmation as to its correctness. While the Act of 1832, and the Act of 1917 do not require an affidavit to be attached to the account when filed, such practice has been uniformly followed, and it was said in Case's Estate, 1 Kulp 307, "No account can be stated according to law unless to the account is subjoined the oath or affirmation of the accountant, subscribed by him, that such account is just and true, both as respects the items of charge and discharge."

The Act of 9 April, 1915, P. L. 72 provides: "That a judge of any court of record shall not, in any matter, case, hearing, or proceeding before him, receive or consider any petition, or paper in the nature of a petition, alleging any

matter of fact, unless the petition or paper is duly verified as to such allegations. "It may be contended that an account filed in the register's office is not a petition in a court of record, or a paper in the nature of a petition, but all accounts so filed must be transmitted by the register to the Orphans' Court; and in any county in which a separate orphans' court is established, all accounts filed in the office of the register shall be examined and audited by the court, and if not excepted to shall, after due consideration, be confirmed. The filing of the account is the first step looking toward securing the approval of the court of the manner of administering the estate by the fiduciary, because, under the law, it becomes ultimately the duty of the court to examine such account, consider and pass upon the facts therein alleged, and approve the same by confirmation, or withhold approval. It appears, therefore, that the filing of an account by a fiduciary is in the nature of a petition alleging matters of fact in a court of record, because its purpose is finally to secure the approval of the court of its contents setting out in detail the acts of the fiduciary performed in his official capacity, and the court should not receive or consider the account unless the same is duly verified.

AND NOW JANUARY 3, 1921, confirmation is refused.

Estate of Hiram Moyer, Deceased.

Essential element of a will - Assignment of a fund - Right to property.

1. Notwithstanding the time of payment is not definitely fixed in the obligation, and maturity may not occur until after the death of the obligor to the obligee, and the obligor has lost dominion and control over the same the paper is not a will because the act of the obligor is irrevocable; irrevocability being an essential element of a will, and irrevocability destroys the testamentary character of the paper.

2. When a paper contains a promise to pay out of a particular fund, it does not amount to an assignment of the fund as against the holder of the fund unless he consents to the appropriation by an acceptance of the terms of the paper, and it is not binding upon other parties in interest in the absence of notice and consent.

3. Every man has the right to do with his property as he sees fit, and the fact that he transacts business a short time before his decease, and during his last illness does not invalidate his actions in the absence of any proof of fraud, undue influence or mental incapacity.

Audit. No. 14, September Term, 1920. O. C.

J. W. Moyer, for accountant.

J. B. Reilly and E. D. Smith, for claimants.

WILHELM, P. J. January 17, 1921.

From the evidence, we find the following facts.

I. Hiram Moyer died on or about the fifth day of February, 1920, testate, unmarried, having disposed of the whole of his estate by last will and testament, dated March 8, 1918, in which he revoked and made void a testamentary trust, and distribution of his estate, reposed in his son, Sherman T. Moyer. After providing for the disposition of his body, and directing a proper tombstone suitably inscribed, and the manner of conducting his funeral, he directed his executor and executrix to collect the amount due upon his insurance policy, the amount that he had deposited with his son Sherman T. Moyer, and all other assets, and convert the same into cash, and to pay his funeral expenses, and lawful indebtedness. Of the residue of his estate, he bequeathed to his son, Sherman T. Moyer, \$5.00, to his daughter

er, Nevada S. Super \$5.00, to his daughter Sarah E. Stevenson \$10.00, his son David J. Moyer \$10.00, his son Oscar S. Moyer \$25.00, his daughter Laura S. Spangler \$25.00, and his daughter Amy L. Huper \$25.00. The balance of the residue remaining after payment of the above bequests was devised and bequeathed to his daughter Mary E. Moyer. The testator divested himself of his interest in the insurance policy by assignment duly executed during his lifetime, and collected about the same time all money due him from his son, Sherman T. Moyer, and the account as stated, shows no balance, which could be applied to the payment of the bequests of cash to his several children.

II. Nevada Super presents a claim for \$313, and in support of her claim offered in evidence a number of papers, which establishes without contradiction the fact that she had advanced to her father, the testator, various sums of money, from time to time previous to the year 1906 to pay the premiums on a life insurance policy issued to the testator. Each of these set out that the sum so advanced by Mrs. Super was "to be repaid" and some of them recite that the payment was to be made at the maturity of the policy, and others the re-payment was to be made when the policy becomes due or "out of said insurance when due."

One of the principal objections to the allowance of the claim of Mrs. Nevada Super is that the papers upon which her claim is founded are testamentary in character, and revoked by testator's last will and testament, because the amount the decedent obligated himself to pay was not due and payable until after his death. This contention is not well founded, because an examination of the papers shows that the death of the obligor was not mentioned in any of them. The time of payment of the money called for in these papers was specified to be at the maturity of the policy of insurance. It was established by the testimony that money was advanced by the claimant to pay the premiums on the policy, and that the policy was what is commonly known as a life policy, that is the amount due thereon according to

its terms was to be paid at the death of the insured. The policy was made payable to the estate of the insured, and while ordinarily a life policy does not mature until the death of the insured, yet it is a well known fact that a life policy issued to be payable to the estate of the insured can by mutual arrangement between the company, and the insured be made the subject of a settlement, and the contractual relations between the company and the insured terminated. And this method of cancelling an insurance contract is of frequent occurrence; and if the testator had made a cash settlement on this policy during his lifetime, the right of action for the money due upon the papers would have then accrued to the claimant. Therefore, the time of payment of the money advanced by the claimant was not necessarily at the death of the testator, but was to be no doubt by their mutual understanding when the money would be realized upon the policy, because it was stipulated in several instances it was to be paid out of that particular fund irrespective of whether that time occurred before or after death of the insured.

While the papers are not skillfully drawn, they are in effect a promise on the part of the obligor to pay to the claimant the money she had advanced to him, to pay insurance premiums. The papers were delivered by the obligor to the obligee and establish the relation of debtor and creditor, and by their delivery passed beyond the control of the obligor, therefore, they were irrevocable, and not in any manner testamentary. It was said in Mack's Appeal, 69 Pa. 231: "This being so, these sealed notes can in no sense be regarded as testamentary, for revocability is of the essence of a testament," and this is the answer to the contention that the papers upon which Mrs. Super's claim is founded are testamentary in character.

The statute of limitations has been pled against the claim of Mrs. Super, but it cannot prevail in this instance. The date of payment was not definitely fixed by the papers. The time of payment was specified at the maturity of the

policy or when the policy becomes due, either of which events was uncertain, and so understood by the parties. It happened, however, that the policy became due at its maturity, arising from the death of the insured, which occurred on the fifth day of February, 1920. Until that time the claimant could not have sued upon the papers, because the right of action had not accrued. The rule is that the statute begins to run at the date suit may be commenced, *Masteller v. Masteller* 93 Pa. 350. *Tompkin v. Bond*, 114 Pa. 414.

The claim of Nevada Super, including principal and interest, amounting to \$693.25 has been proved.

III. The claim of Sarah A. Stevenson for \$300.00, the amount of money she advanced to her father to pay premiums on his insurance policy, and the claim of Walter Stevenson and wife for \$157.00, money advanced to Hiram Moyer to pay the funeral expenses of Lydia Moyer, the deceased wife of Hiram Moyer, may be considered together. Both of these obligations were admitted to be due Hiram Moyer on the 14th day of August, 1908, as set out in a paper appointing Sherman T. Moyer, Trustee for the children of Hiram Moyer, which paper included a statement wherein Hiram Moyer appears to have set forth a recital of his personal estate and his indebtedness, which includes the claims here under consideration, and directed distribution of the balance remaining of the same, after the payment of the obligations, to his children.

According to the papers designated Exhibit A and Exhibit B in a Bill in Equity offered in evidence, the amounts of money here claimed were acknowledged to be due and payable in the year 1908, and there is no evidence that said claims were paid at any time subsequent. And in the year 1918, Hiram Moyer included in said Bill in Equity filed to No. 1 March Term, 1918, in the court of common pleas of this county a copy of said papers marked Exhibit A and Exhibit B, and did not deny at that time any of the allegations contained in said papers, or that he was not indebted to said claimants in the amounts set forth in these papers.

Therefore, we have the acknowledgement of this indebtedness by Hiram Moyer, over his signature, in 1908, and a practical re-affirmation of that acknowledgement ten years later, and no proof of payment. The statute of limitations has not been pled against these claims, and both of them are allowed with interest, to wit:

Mrs. Sarah A. Stevenson	\$300.00
Interest from Aug. 14, 1908	223.50
	<hr/>
	523.50
Walter Stevenson and wife	\$157.00
Interest from Aug. 14, 1908	116.96
	<hr/>
	\$273.96

IV. Nevada Super has filed seven exceptions to the account, all of which exceptions are practically embraced within the exceptions numbered four and five. Exception No. 4 relates to the policy of insurance before mentioned, issued upon the life of the testator, the proceeds of which policy was paid by the insurance company to Mary E. Moyer, the accountant, after the death of the testator. As mentioned before, this policy was payable to the estate of Hiram Moyer. In the year 1905, Hiram Moyer assigned to Sherman T. Moyer all his right, title and interest in the said policy of insurance; and on the 16th day of January, 1919, Hiram Moyer executed another assignment of his interest in said policy to Mary E. Moyer, his daughter, and in said paper declared void any assignment before made to Sherman T. Moyer. And on the 12th day of January, 1920, Sherman T. Moyer assigned all his right, title and interest to Hiram Moyer, and on January 27, 1920, Hiram Moyer executed another paper in which he assigned to Mary E. Moyer all his right, title and interest to said policy. All of these assignments were attached to and made a part of the policy of insurance. Any interest that Hiram Moyer had in this policy of insurance was transferred during his lifetime,

therefore, the proceeds of the policy formed no part of his estate, and no valid reason has been shown for including the sum realized upon the policy in the inventory and appraisement or the account, and exceptions Nos. 1, 2 and 4 are dismissed, and exception No. 3 is sustained to the extent hereinafter noted, as to bank deposits.

In this connection, it may be well to note that it is asserted that the proceeds of the insurance policy is a part of the estate of the testator, because the papers evidencing the relation of debtor and creditor between the testator and Nevada Super asserted that the debt should be paid out of the insurance or when the policy of insurance matured. It appears by the terms the papers that the testator agreed that the debt should be paid out of the money arising from the insurance policy. It is not an assignment of the whole of the fund. In fine it is not an assignment of any portion of the fund. It is merely a promise to pay out of this particular money realized from the insurance. It is not shown that the insurance company had any notice either before or after the death of the insured of the existence of these papers, and of course, did not assent to the promise or accept any obligations by virtue thereof. The insured, therefore, retained control over the fund, and had authority to collect it. "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. The assignor must not retain any control over the fund; any authority to collect it or any power of revocation. If he does, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compelled to do so, though forbidden by the assignor. Geists Appeal 104 Pa. 351.

When a paper contains a promise to pay out of a particular fund it does not amount to an assignment of the fund as against the holder of the fund unless he consents to the appropriation by an acceptance of the terms of the paper, and it is not binding upon other parties in interest in the absence of notice and consent.

The fifth exception relates to the sum of \$3874.66, which was paid by Sherman T. Moyer to Hiram Moyer on January 13, 1920, and not included in the inventory or the account. It appears that this sum of money was paid by check, which check was deposited in the Merchant's National Bank in the account of Hiram Moyer on or about the day of its date. It also appears that on January 14, 1920, Hiram Moyer issued his check to the order of Mary E. Moyer on the Merchants National Bank for \$910.90, and on the same day issued another check to the order of Mary E. Moyer on the same bank for the amount of \$2950, and that said bank paid to Mary E. Moyer the sum of \$3860.90 on these checks during the lifetime of Hiram Moyer. The check of Sherman T. Moyer issued to his father, Hiram Moyer, for \$3874.66 was endorsed by Hiram Moyer with his mark, J. W. Moyer, Esq., the attorney representing the accountant being the witness to the mark, and the said checks issued to Mary E. Moyer were signed by Hiram Moyer with his mark, and the said J. W. Moyer, Esq., was the witness to the signature of Hiram Moyer. All these checks were admitted in evidence without objection, and stand on the record uncontradicted.

The testimony shows, therefore, that Hiram Moyer in his lifetime divested himself of all the money he had in the Merchants National Bank, excepting the sum of \$13.76 about twenty-two days before his death. There is no proof here of any fraud practiced upon Hiram Moyer or that he was mentally incompetent to transact business. Every man has the right to do with his property as he sees fit, and the fact that he transacts business a short time before his decease, and during his last illness does not invalidate his actions in the absence of any proof of fraud, undue influence or mental incapacity. In this case a reading of the will shows that Hiram Moyer did, just before his death, what he had determined to do about two years previous, that is, give the whole of his estate, with few exceptions, to Mary E. Moyer, his daughter.

It appears there remained in the Merchants National

Bank at the time of the death of the testator the sum of \$13.76, and the accountant asked that she be surcharged with this amount. The surcharge is allowed. It follows, therefore, that all of the cash remaining in the Merchants National Bank belonging to the estate of Hiram Moyer is now included in the assets of his estate, and the fifth exception should not be sustained except as just above indicated.

V. We have discussed the insurance policy proceeds and the money in bank separately, because they were made the subject of separate exceptions, but counsel for the exceptant has seen fit, in his brief, to discuss them together, and generally we may say, in reply to the assertion that the accountant produced or offered no evidence to prove the execution of the signatures to the checks and to the assignment of insurance; that these papers were offered in evidence without proof of the signatures, and the offer was not excepted to, and were admitted in evidence without protest or exception from any one. Counsel for the exceptants being present at the time, it can be said that they acquiesced in the papers going into the record, and this action is tantamount to an agreement or admission that the papers were duly executed by the testator; and exception at this time to their admission is too late to destroy their value as evidence.

It is asserted in the brief that the gift of the money in bank and the interest of the testator in the insurance policy has not been established by satisfactory evidence, notwithstanding it has been shown that the testator did, in his lifetime make an unconditional assignment of his insurance policy to his daughter, and did execute and deliver to her checks for practically all the money deposited to his credit in the Merchants National Bank, which checks were presented for payment and were paid about the time of their date. The assignment of the policy of insurance, and the transfer of the cash in bank to the daughter by the testator were irrevocable, and if the testator had recovered his

health, and repented his conduct, his dominion and control over the money in bank and his interest in the insurance policy were lost unless he could show fraud, undue influence, or mental incapacity. The delivery of the possession according to each of the subjects under discussion was complete, and irrevocable, and the evidence to prove the same is clear and satisfactory. If the burden was cast upon the accountant to establish her claim to the proceeds of the insurance policy and the money in bank by satisfactory evidence, she has met that burden by indubitable evidence, and has satisfactorily shown that the funds in question were her own property, and not the property of the testator, therefore, should not have been included among the assets of his estate. The accountant also asks to be surcharged with the sum of \$2.17, balance of deposit remaining in the Pennsylvania National Bank. The surcharge is allowed.

The sixth exception is dismissed.

The seventh exception is not sustained by testimony, and is dismissed.

VI. Sarah E. Stevenson has filed seven exceptions to the account which are practically a repetition of the exceptions filed by Nevada S. Super, and all of these exceptions are not sustained for the reasons given in disposing of the exceptions filed by Nevada S. Super.

VII. No exception has been filed to any items of credit contained in the account, therefore, they stand unchallenged and are presumed to be proper payments made on the part of the accountant, and the account shows that the executrix has advanced out of her own funds \$785.96, money paid out for administration and other expenses, and leaves the estate indebted to her in that amount. The executrix admits the following surcharges:

Cash in Merchants National Bank	\$13.76
Cash in Pennsylvania National Bank	2.17
Total	<hr/> 15.93

This, therefore, reduces the amount of the indebtedness of the estate to the accountant to the sum of \$770.03. Therefore, there remains no cash in hand which can be appropriated to the payment of debts and legacies.

AND NOW JANUARY 17, 1921, the account as stated, including the items of charge and discharge herein noted, is confirmed absolutely.

Brown vs. Leib

Mandamus - Dismissal of appeal - Nominations of candidates for public offices - Act of June 10, 1893, P. L. 424.

An appeal to the Supreme Court, from a judgment quashing a petition for a mandamus will be dismissed when the question raised is merely academic and a decision on the merits would be without effect; moot questions or abstract principles of law will not be decided.

The act of June 10, 1893, P. L. 424 does not apply to nominations made by a body of citizens acting as a political party which has not complied with the provisions of the act.
Supreme Court. Appeal dismissed.

No. 153, January Term, 1920. Appeal from No. 341, November Term, 1919.

William Wilhelm, for appellant.

E. D. Smith and A. L. Shay, for appellee.

FRAZER, J. April 12, 1920.

Upon plaintiffs' petition a writ of alternate mandamus was issued directed to the Commissioners of Schuylkill County to show cause why they should not accept and file in their office a certificate of nomination of candidates for county offices to be voted for at the election to be held November 4th, 1919. The court below sustained a motion to quash the writ, from which order petitioners appealed.

We now have a motion to dismiss the appeal, one reason in its support being that since the time for holding the

election has long passed, the question raised is merely academic and a decision on the merits at this time would be without effect. This point is well taken, as we have frequently stated we will not decide moot questions or abstract principles of law: *Winston v. Ladner*, 264 Pa. 548, 550, and cases cited. However, owing to the importance of the question to citizens and political parties desiring to nominate candidates to fill vacancies, we have concluded to consider the merits of this case, although our action in this respect must not be regarded as a precedent for the determining of such questions in the future.

The petition for mandamus avers that on September 30th, 1919, petitioners and others to the number of about thirty-five citizens, all qualified electors of the County of Schuylkill, met in convention in the City of Pottsville, within that county, and formed "a political party for the purpose of nominating for election county and municipal officers in Schuylkill County at the November election 1919." The convention elected a president and secretary and adopted a motion authorizing the president to appoint an executive committee of five persons "for the purpose of nominating, substituting, filling vacancies, pre-empting a title, designating a party name, and for such other powers and duties as might be necessary thereto." The committee so authorized was duly appointed and, pursuant to the action of the citizens meeting, nominations were made and filed designating named persons to be voted for at the coming election for the several offices to be filled at that time. The name "Equal Tax Party" adopted by the committee was owing to the objections filed on October 10th, 1919, by persons representing the "Tax Revision Party," and after hearing and action by the court, changed to the "Equal Assessment Party." In the meantime all persons named as candidates for the several offices to be voted for, except two, withdrew their names and executive committee appointed by the chairman met and selected other persons to fill the vacancies thus created.

The county commissioners refused to accept and file the certificate of substituted nominations for the reason it was not, in their opinion, properly authenticated as required by law. The contention of the commissioners was sustained by the court below.

The right of petitioners to the mandamus prayed for depends upon the construction of section 11 of the Act of June 10, 1893, P. L. 424, which provides: "In case of the death or withdrawal of any candidate nominated as herein provided, the party convention, primary meeting, caucus, or board of the citizens who nominated such candidate, may nominate a substitute in his place, by filing in the proper office at any time before the day of election, a nomination certificate or paper which shall conform to all the requirements of this act in regard to original certificates or papers: Provided, that if the said convention or citizens shall have authorized any committee or if any executive committee of any political party be authorized, by the Rules of said party, to make nominations in the event of death or withdrawal of candidates, the said convention shall not be required to reconvene nor the said citizens to sign a new nomination paper, but the said committee shall have power to file the requisite nomination certificate or paper, which shall recite the facts of the appointment and powers of the said committee, (naming all its members) of the death, or withdrawal of the candidate, and of the action of the committee thereon, and the truth of these facts shall be verified by the affidavit, annexed to the certificate or paper of two members of the committee, and also of at least two of the officers of the convention who made affidavit in support of the original certificate, or two of the citizens who made affidavit to the original papers: And Provided, also, that in case of a substituted nomination paper not filed by a committee but signed by citizens it shall only be necessary that two-thirds of the signers of the said paper shall have been signers of the original paper."

Under the Act of June 12, 1913, P. L. 719, Sec. 2, to

qualify as a political party within a county and make nominations as such, the body of electors of which the party is composed must be such that one of its "candidates at either the general or municipal election preceding the primary polled at least 5 per centum of the largest entire vote cast for any elected candidate." It seems to be conceded the Equal Assessment Party did not meet the requirements of this provision. Nevertheless, the persons attending the organization meeting proceeded to act as a political party and appointed an executive committee pursuant to the theory that they existed as a political party and enjoyed all rights and privileges incident to a political organization. Under the section of the Act 1893 above quoted, acting merely as a body of citizens, petitioners might have made nominations and also authorized a committee to make further nominations in the event of the death or withdrawal of any of the candidates chosen at the convention. Or, in case of their failure to appoint a committee, the citizens participating in the meeting over the signatures of two-thirds of the signers of the original paper might make a substituted nomination to fill the vacancy. They did not pretend to act as a mere body of citizens, however, and as such appoint a committee to act for them, but acted as a political party and appointed a committee designated as the executive committee of a political body. The authority given the executive committee of a political party cannot be construed to give its members power to act as a committee of citizens upon discovery being made that the convention appointing them was not duly constituted as a political body. The law makes a distinction between combinations existing as political parties and those not parties by providing a distinctive procedure for each to follow to secure a place for candidates on the official ballot, and, in determining whether such procedure has been adopted in a given case, the law applicable to the particular character of the combination must be the guiding principle.

The appeal is dismissed.

Estate of E. J. Fry

Powers of executors - Sale of real estate - Agreement of sale by legatees.

Where an executor is given the power of sale, and a sale is necessary to carry out the provisions of the will, and the executor has sold, the court will not interfere with the action of the executor when no improper conduct on the part of the executor has been shown, notwithstanding the legatees under the will executed an agreement of sale, which antedated the action of the executor in making sale.

When a power of sale is given to an executor, and a sale is necessary to carry out the provisions of a trust imposed by the will, the executor is obligated by the directions as to the trust, and it is his duty to sell.

Petition to restrain sale. O. C.

A. L. Shay for petition.

J. F. Whalen and R. J. Graeff, contra.

WILHELM, P. J. December 20, 1920.

Max Lewis and Benjamin Superstine on petition filed obtained an order on the first day of June, 1920, restraining Charles Graeff, executor of the last will and testament of E. J. Fry, deceased, from executing and delivering to George Seligman a deed for certain premises in the Borough of Tamaqua, and to show cause why an agreement of sale entered into between the said Charles Graeff, executor, and the said George Seligman should not be declared null and void, and why the said Charles Graeff, executor should not execute and deliver to the petitioners a deed in fee for said property. Subsequently it was discovered that Charles Graeff, executor, had, previously to the filing of the petition, to wit, on the twenty-seventh day of May, 1920, executed and delivered to G. S. Seligman a deed for said property, which deed was recorded on the twenty-eighth day of May, 1920, in the office for recording of deeds, whereupon application was made to amend the prayer to the effect that said deed be declared null and void, and the recorder of deeds be directed to strike the same from the record.

It appears that Max Lewis and Benjamin Superstine obtained from the legatees under the will of E. J. Fry, deceased, an agreement to convey said property, which is situated at the southwest corner of Broad and Centre Streets in the Borough of Tamaqua for the sum or price of \$25,000.00, Three Hundred Dollars of which was paid down on the date of the agreement, to wit, the fifteenth day of May, 1920, the balance to be paid when the title to the property was pronounced good by Arthur L. Shay, Esq., and upon delivery of a proper deed by the heirs or the executor of the said E. J. Fry, deceased. The negotiations for the sale on the part of the legatees with Lewis and Superstine were made possibly without the knowledge of the executor and certainly without his consent.

The will of E. J. Fry governs this case, and a reference to the will shows that the testator not only gave to his executors the power of sale, but as to the remainder of his estate, in the fourth clause, he bequeathed one-third part thereof 'when sold and converted into money' to his wife absolutely, and to his daughters, Lizzie F. McVaugh, and Annable Howell, and his grand-son, Lambert F. Whetstone each the equal one-third part of the remainder. In the sixth clause, the testator directed as soon as his executors have \$40,000.00 in hand that the sum of \$10,000. should be paid to his wife, and that the further sum of \$10,000 for each of his daughters and grand-son be placed in trust for each of them by his executors in a safe and reliable Trust Company which money is to remain and be held in trust for them during their natural lives.

There is nothing in this record which shows that the real estate in question was not a part of the remainder of his estate, contemplated by the fourth clause of the will, which unmistakably indicates that his executors were to sell the remainder and divide the proceeds of the sale as the will directs, and this unmistakable direction to the executors to sell and apply the proceeds cannot be ignored by the executor, and should not be interfered with by the court.

It does not appear that the executors have complied with the sixth clause relative to the sum of forty thousand dollars which the executors are to dispose of as soon as the same comes in hand by paying to the wife Ten Thousand Dollars, and paying Thirty Thousand Dollars into a Trust Company for the use and benefit of his daughters and grandson during their lives. If the provision in the sixth clause has not been complied with, and we have ample reason to believe from knowledge gained in other proceedings in this estate that the sum of Thirty Thousand Dollars has never been paid to a trustee for the use and benefit of his two daughters and grandson, it is the duty of the executor to see to it that this provision of the will is carried out, because it is one of the primary objects of the testator. It does not appear that the executor can perform the duty imposed upon him by the sixth clause without making the sale of the real estate and if the heirs sell the real estate and receive the money therefrom, this important and salutary clause of the will would be violated.

The portion of Lambert F. Whetstone, the grand son, except the trust sum of Ten Thousand Dollars, was directed in the eighth clause to be held by and remain in the hands of the executors who are to act as trustees and invest the same, and from the income support and maintain the grandson until he obtains the age of twenty-one years, after which the income is to be paid to the grandson for five years and then, if the grandson is settled down to some regular business or occupation, is sober, thrifty and shows a disposition to take care of his money and not squander it; then the executors are to pay over to him the principal of his share (except as aforesaid) otherwise the share or portion of my estate payable to my said grand-son is to be held in trust by my executors who as his trustees shall invest the same and pay over only the income thereof as it accrues to my said grandson, and in the event of his death before he attains the age of twenty-six years then his said share or portion of my estate is to go to my said daughters in equal

shares.'

None of the principal of this estate is bequeathed directly to Lambert Fry Whetstone. Ten Thousand Dollars was to be placed with a Trust Company who are to pay the income to Lambert Fry Whetstone and the principal thereof was not to be paid to him at all, but to his children upon his death. The remainder of the legacies to Lambert F. Whetstone was placed in trust and is now in trust in the hands of the executors who, as trustees, are to invest the same and pay the principal thereof to him when he attains the age of twenty-six years, if he is settled down to some regular business or occupation, is sober, thrifty and shows a disposition to take care of his money, in which event the executors are to pay over to him the principal. Under the will the control of the interest of Lambert F. Whetstone is in the executors and the legatee may never come into the control and possession of the principal. Under these circumstances the legatee could not convey a marketable title, and the power of sale as to this interest rests solely in the executors, and will remain there until it is divested by the executor exercising the discretion reposed in him or until the court has decided that he is abusing his discretion. The presumptions are all in favor of the honest exercise of the discretion reposed in the executor by the will and fraud or collusion will not be presumed, and the court will not interfere with the discretion placed in the executor without clear and adequate cause. The reason of this rule is the testator has a right to dispose of his property as he pleases and he may subject any or all part of it to the discretion of his executor or trustee, and this discretion properly exercised will not be interfered with by the court unless it is judicially determined that the trustee is not exercising his discretion, but abusing it. *Buckers's Estate* 225 Pa. 427.

Lambert F. Whetstone has attained the age of twenty-six years. The decision as to whether he has further qualified to receive his legacy does not rest with him, but is im-

posed upon the executor or trustee, who, if he abuses his discretion, can be brought into court to answer. It has not been shown that the executor acting as executor or trustee has decided that the conditions are such and the time has arrived to pay over to the grandson the principal of his estate. Lambert F. Whetstone has not indicated, by any proceeding in this court that he is not in accord with the action of the executor or trustee, therefore, the provision of the will as to the time when the trust for the grandson shall terminate must be respected, because the will is the law governing this case.

The petitioners here have attempted to obtain title through the legatees, and are invoking the power of the court to set aside the sale made by the executor, but are assuming the anomalous position that the deed of the executor under the direction of the court is necessary to perfect their title, as evidenced by their prayer for an order upon the executor. If the power of sale rests in the legatees no reason exists for ordering the executor to execute and deliver a deed to the petitioners. The will does not give a joint power of sale to the legatees and executors. In fine it does not give to the legatees any power of sale, and the only theory upon which the legatees could convey good title is the untenable one that all of the provisions of the will had been carried out, and the trusts terminated.

The executors are given the power of sale. In order to carry out the provisions of the will there is an absolute necessity to sell and the authority to sell rests solely in the executor, who has exercised his authority and sold. Under these circumstances it is impossible to understand how the court would have any authority to interfere with the sale. If the executor was here, asking for an order to make sale, the order should be refused, because ample power is given to him by the will. How then could the court interfere with the exercise of his authority to sell the real estate after a sale has been consummated.

AND NOW, DECEMBER, 20, 1920, the restraining or-

der, dated June 1st., 1920 is revoked, and the petition is dismissed.

Estate of Charles D. Kaier

Partition - Equitable conversion - Sale of real estate.

Where a will works an equitable conversion of the real estate a sale is necessary to effect a distribution of the estate and when the executor has such power a partition proceeding is not proper.

Petition for partition. O. C.

E. D. Smith, J. H. Garrahan and John J. Moran, for petition.
T. H. B. Lyon, D. W. Kaercher and A. D. Knittle for executor.

J. F. Whalen for legatee.

WILHELM, P. J. December 20, 1920.

This is an application praying that a citation be awarded to show cause why an inquest in partition should not be granted in the Estate of Charles D. Kaier, late of the Borough of Mahanoy City, deceased, who died on the thirty-first day of May, 1899, and whose will was admitted to probate.

An answer was filed by Charles F. Kaier, surviving executor, and one of the legatees of Charles D. Kaier, in which it was alleged that the executor of the will of Charles D. Kaier has power under the will to sell the real estate, and that the executor has filed a petition in this court praying for an order and decree authorizing and directing him to make sale of the property described in the petition, and that the will of Charles D. Kaier worked an equitable conversion of all the property included in the petition, therefore, the proceeding in partition should not be maintained.

This answer, notwithstanding one of the legatees and her husband filed another answer setting forth that a proceeding in equity has been commenced in the court of common pleas to determine whether or not the real estate set out in the petition comprises all of the real estate of Charles D. Kaier, deceased, brings us to the consideration of the question of first importance.

The will of Charles D. Kaier, after directing that all of his just debts and funeral expenses be paid, provided as follows:

"I give, devise and bequeath unto my wife, Margaret C. Kaier, all my estate, real, personal and mixed, of whatsoever and wheresoever situate, to have, hold, use and enjoy the same for and during the term of her natural life, or so long as she remains my widow, and at and upon her decease or remarriage, I give, devise and bequeath the same, or so much thereof as may then remain unexpended, as follows, to wit:"

Following this bequest are six other bequests in which the testator gives the equal one-seventh part of his estate remaining unexpended to his six children, respectively, and disposes of the other one-seventh as follows:-

"As to the remaining one equal seventh part thereof, I direct that my executors hereinafter named shall hold the same in trust, invest the principal in good securities, collect the interest and income therefrom, and, at their discretion, to pay the said interest and income, and also, from time to time, so much of the principal fund as in their opinion may be necessary and proper, to my grand-daughter, Marie Florence, the child of my late daughter, Ella C. Lieberman, during the term of her natural life and at and upon her decease the principal thereof, or so much thereof as may then remain, shall be paid and distributed to and among my six children hereinbefore named, in equal shares."

The above bequests were followed by these provisions:

"In case either of my said children shall die before the final division of my estate as above directed, or before the

decease of my grand-daughter above named, leaving lawful issue, such issue shall receive the deceased parent's share, but if there be no such issue, then such share shall fall into the general fund, to be divided among the survivors in the manner hereinbefore provided."

I do hereby give and grant to my executrix and executors hereinafter named, full power and authority to grant, bargain and sell, at their discretion as to time, manner and terms, any and all real estate of which I may die seized, possessed, or in any manner entitled to, and the same to convey by good and sufficient deed or deeds to the purchaser or purchasers thereof."

This case was set for hearing on petition and answers. It is contended that the will taken as a whole operates as a conversion although there was no positive direction to sell contained in the will, but that the power of sale taken in connection with the other provisions of the will exhibits an intention and purpose on the part of the testator that his real estate and personal property should be converted into money, and that the purposes of the will can not be executed without such conversion. Controversy such as we have here only arises where, in the absence of express direction to sell, intention to convert can be gathered from the provisions of the will taken as a whole. It seldom happens that two wills are exactly alike in their terms, therefore exact precedents are rare, but the correct rule to apply here is; is a sale necessary to carry out the provisions of the will, as the testator contemplated, or has the testator in disposing of his property blended his real and personal property and created a single fund out of which the legatees are to be paid.

In the first disposing clause the testator provided that the whole of his estate without distinction as to its character, whether real or personal, should go to his wife for her use and enjoyment during life or widowhood, and upon her decease or re-marriage he bequeathed the same, or so much thereof as may remain unexpended, over, and after giving one-seventh of the remainder to each of his six chil-

dren, he provided as to the remaining one-seventh that his executors should hold the same in trust, invest the principal, and collect the interest and income therefrom, and pay the same as the will directs. He further provided that in case of the death of any of his children before final division or before the decease of his grand daughter not leaving lawful issue the share of such child should fall into the general fund, to be divided among the survivors.

Is it not apparent, on the face of the will, that it was the intention of the testator that his real and personal property should be converted into money for investment and collection of income, and for distribution? It is not possible to execute that provision of the will which bequeathes the remaining one-seventh to his grand-daughter without a conversion, because the executors are required to invest the principal of the same in good securities only and to pay over to the grand-daughter the interest and income, and also so much of the principal as in their opinion may be necessary. It seems that effect cannot be given to this material provision of the will without the exercise of the power of sale, because the direction to invest in good securities carries with it the thought that a fund must be created by a sale of both the real and personal property so that there will be cash in the hands of the executors which may be invested.

The language contained in the provision of the will providing for the contingency which might arise by reason of the death of any of his children without lawful issue to the effect that the share of said child should fall into the general fund also indicates that the testator, not only blended his real and personal property thereby intended to create a fund from which the beneficiaries are to be paid but a sale is necessary to carry out the provisions of the will so that the share of a child dying without issue should fall into the general fund. A fund is defined to be "an accumulation or deposit of resources from which supplies may be drawn. A sum of money, especially one, the principal or interest of

which is appropriated or devoted to a specific object." The general tone and language of this will indicates it was drawn by a person of intelligence who would naturally use words and language that would best express the intention of the testator, and it is fair to presume that when the words "general fund" were used, the testator intended that for the purpose of distribution of his estate a general fund was to be created by sale out of which the beneficiaries of his estate were to be paid. The use of the words general fund precludes the idea that real estate was contemplated, and no one understanding the meaning of words would use the words "general fund" if real estate was intended to form a part of it.

The facts in this case closely resemble the facts in the case of *Fahnestock vs. Fahnestock*, 152 Penna. 56, which has been cited with approval in many cases following it, and where due effect could not be given material provisions of the will without treating a mere power of sale as a direction to sell and so operating as an equitable conversion, it was said, "If a testator authorizes his executors to sell his real estate and to execute and deliver to the purchasers deeds in fee simple, of the same, as in this case, and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised, it will be construed as a direction to sell, and operate as an equitable conversion. If in addition to this clear intention of the testator it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell."

In *Severns Estate* 211 Penna. 65, it was held that an intention to convert would be implied although a sale was merely authorized, if a sale was necessary to carry out the provisions of the will, and make distribution of the proceeds of the property. In *Kuppel's Estate*, 25 District Reports 116, the testator merely authorized his executor to sell real

estate and give the proceeds to his children nominatim. The court said, in reaching a conclusion as to whether or not there was a conversion: "The mere reading of the will shows that the authorization to sell was tantamount to a direction, for the nine children were in terms given the proceeds and not the real estate itself. Therefore a sale was essential to effect the distribution contemplated by the testator."

In this estate, power and authority to sell was given and the executors were directed to hold one-seventh and invest the same; and other sevenths, upon certain contingencies, were to fall into the general fund. This power of sale was equivalent to a direction to sell for investment and for the creation of a general fund, as well as distribution. Since the will worked a conversion, it is obvious it is not necessary to consider or discuss the answer which asserts that the petition should be dismissed because all of the real estate which Charles D. Kaier died seized and possessed of is not included in the petition for partition.

In reaching this conclusion, I am not unmindful of the fact that the will vests in the executors the power of sale at his discretion as to time and place and that the executor has evidenced his decision that sale should be made by presenting to the court a petition praying for an order upon him to make sale. In coming to this view, I have not considered the effect of the power of sale given by the will, and the decision of the executor to make sale because the great delay in the settlement of this estate which necessarily arose on account of its magnitude, the various interests, and questions of importance involved, ought to be terminated as speedily as possible in order to conserve the estate. And since the question of equitable conversion seems to be an important dispute, which it may be necessary to ultimately decide in order to hasten the settlement of the estate, I have considered and decided that question herein independent of the present decision of the executor to sell the real estate under the power given to him in the will.

AND NOW, DECEMBER 20, 1920, the petition is dismissed.

Schuylkill Railway Co. v. Public Service Commission et al.

Public Service Commission - Evidence - Rules of evidence - Written contract - Proof of contract - Record - Presumption - Act of July 26, 1913, P. L. 1374.

The Public Service Company Act of July 25, 1913, P. L. 1374, contains no provision relating to the kind of evidence which may be received and acted upon by the commission; but, the commissioners not being considered as judges learned in the law, the legislature did not contemplate that the strict rules of evidence should be applied to their hearings.

In a crossing proceeding between a railway company and an electric railway company, the latter cannot allege that a contract between the railroad company and the railway company's predecessor in title, was not proved in accordance with law, where it appears that a copy of the contract in question was offered by counsel for the railroad company, with a statement that it was a copy of the agreement taken from the files of the company, where the originals of all agreements were kept, and had been prepared and verified by himself, such paper being presumably a copy of one on file, as required by the Act of 1913, with the commission, and its accuracy not being challenged.

Supreme Court.

Appeal, No. 61, Jan. T., 1920, by plaintiff, from judgment of Superior Court, Oct. T., 1918, No. 236, affirming order of the Public Service Commission, No. 1732, 1918, in case of Schuylkill Railway Co. v. Public Service Commission and Lehigh Valley Railway Co. Affirmed.

C. A. Snyder, Frederick M. Leonard and Arthur L. Shay, for appellant.

S. C. Pratt, for appellee.

MOSCHISKER, C. J. December 31, 1920.

This was a proceeding, before the Public Service Commission, on the part of the Schuylkill Railway Company, to

obtain a certificate of public convenience, evidencing the commission's approval of a "renewal or relocation" of a "crossing at grade by the tracks of the Schuylkill Railway Company over the double tracks of the Lehigh Valley Railroad Company," at a certain point in Butler Township, Schuylkill County.

The petitioners asked not only for the approval of the application for the alteration of the crossing by the laying of new tracks, but also that "the commission apportion the cost of said renewal between the said Schuylkill Railway Company and the said Lehigh Valley Railroad Company, in proportions as to the said commission shall seem meet and proper."

The commission granted the certificate of public convenience, "approving the replacement or renewal of the existing crossing," and directing "the cost and expense thereof to be borne and paid by the Schuylkill Railway Company;" which corporation appealed, because this expense was placed entirely upon it.

The Superior Court affirmed the order of the commission, and the present appeal was allowed, this court directing, however, that it be "limited to the first question raised in the Superior Court;" and this, in the words of appellant, was: "Had the Public Service Commission the right to base their finding on an alleged copy of a contract which was not proved in accordance with law?"

In its printed history of the case, appellant states: "The Schuylkill Railway Company is a public service corporation created under the laws of Pennsylvania, and absorbed, among other roads, the Schuylkill Traction Company."

At the hearing before the examiner, counsel for the Lehigh Valley Railroad Company, called attention to the fact that a copy of a contract between his corporation and the Schuylkill Traction Company — which corporation, as just shown, appellant describes as having been absorbed by it, and the report of the commission, so far as the crossing

and the contract in question are concerned, refers to the corporation as "the predecessor in title to the Schuylkill Railway Company" — was on file with the commission, "covering this particular crossing;" whereupon, the examiner stated that the copy would have to be formally offered in evidence. Counsel for the railway company objected, not to the relevancy or legal effect of the alleged contract, but simply that the copy did not "come up to the proof required in a legal proceeding in the State of Pennsylvania."

In making the formal offer, counsel for the Lehigh Valley Company stated: "This agreement is a copy of the agreement taken from the files of our secretary in Philadelphia, where the original copies of all agreements of the company are kept, and was prepared and verified by me." The evidence was accepted by the examiner.

The Public Service Company Law (Act of July 26, 1913, P. L. 1374) contains no provision relating to the kind of evidence which may be received and acted upon by the commission; but, the commissioners not being considered as judges learned in the law, the legislature necessarily did not contemplate that the strict rules of evidence should be applied to their hearings. The act, by section 18, article VI, provides that the "testimony taken" shall come up on appeal as part of the record; this was no doubt intended to afford the courts an opportunity to see that there was some reasonable basis in the proofs for the decision of the commission, not that they might examine to see whether the strict rules of evidence had been complied with.

The act in question, by section 1, article II, paragraph (g), provides that it shall be the duty of every public service company to file with the commission "verified copies of any and all contracts * * * * entered into by such public service company * * * * or any branch or sub-division thereof, or other public service company, in relation to its public service." It is to be presumed that the contract here in controversy was filed in accordance with this provision; therefore, when the copy was offered by counsel for the railroad

company, he tendered that which was part of the official records of the Public Service Commission. Moreover, we notice that counsel for appellant nowhere claim the contract thus offered was not in fact executed in accord with the terms of the copy put in evidence.

Counsel must have known, from what occurred when the contract was offered, that it was accepted in evidence and might be acted on. They then had their opportunity to tender their proofs, and legal arguments founded thereon, for the purpose of overcoming the effect of the contract, had they seen fit so to do; or, if not prepared, they could have asked for a continuance for that purpose.

Finally, the relevant act of assembly (section 12, article V) confers upon the commission, in cases of this character, power to place the expense of the "construction, relocation or alteration" upon either or both of the public service companies concerned in making the improvement, as "the commission may * * * * in due course determine;" and, while the report of this case indicates the commission took into consideration the contract offered in evidence before the examiner, it does not conclusively show that the order as to the cost or expense of the improvement, rests entirely upon that item of proof; but, even if it did, appellant, in the petition for the present appeal, refers to the contract as an agreement entered into between it, "the Schuylkill Railway Company, and the Lehigh Valley Railroad Company," and asserts that "the question involved" concerns the jurisdiction of the Public Service Commission because of the fact that this contract was entered into "prior to the creation" of such commission — not that it concerns the validity, relevancy or competency of either the contract itself or the copy offered in evidence.

Attention is called to the above stated averment from the railway company's petition, not to raise a new question for decision, but to show the position taken by appellant when it asked permission to bring the case here. We do not discuss that position, since it did not sufficiently im-

press this court to permit its presentation on the present appeal, the appeal being expressly confined by us as hereinbefore recited.

On the whole, we are not convinced that the Superior Court erred in affirming the order of the Public Service Commission.

The appeal is dismissed.

Gray vs. Wolf Creek Coal Co.

Affidavit of defense raising questions of law - Sufficiency of Statement of claim.

A statement of claim which sets out the amount agreed to be paid, the time employed and the rate per month is sufficient.

Law affidavit. No. 118, March Term, 1920.

O. N. Heblich and R. R. Koch, for plaintiff.

P. B. Roads for defendant.

KOCH, J. January 3, 1921.

Taking the plaintiff's statement as a whole, including the exhibits thereto attached, it clearly shows that on the 11th of April, 1917, the defendant offered employment to the plaintiff at a salary of \$250 per month during the life of the defendant's operation at Minersville, and that the plaintiff accepted the offer two days afterwards and entered defendant's employment on or about the 14th of April, 1917. Also, that sometime prior to the first of March, 1919, the plaintiff's salary was increased to \$275 a month and that he was paid all that was due him up to the 15th of March, 1919, and that after the 15th of March, 1919 payments of his salary were not regularly made, and that from thenceforward to the 30th of August, 1919, the company became

indebted to him on salary account in the sum of \$545.00 for which the suit in this case has been brought. Now because the "plaintiff alleges there is \$545.00 due him as the balance of his salary as manager of defendant's operation at the borough of Minersville from March 1, 1919 to August 30, 1919, but avers in paragraph (4) of his statement of claim that he was paid 'his regular salary up and until March 15, 1919,' the defendant says the plaintiff's statement of claim is inconsistent. The period covered in the statement is six months during which the salary would amount to \$1650.00, whereas a balance of only \$545.00 is claimed, which is less than the salary for two months would be. From an inspection of the entire statement it is evident that the plaintiff desires to show, and does clearly show, the times when and the various amounts in which he received moneys on his salary during the period of the last six months of his employment. He alleges that he had been regularly paid, or, at least, paid in full up to the 15th of March, 1919, and shows by his exhibit "A" that thereafter he had not been regularly paid his salary as it became due. The statement is not so inconsistent as to defeat itself. The defendant will not be obliged to again pay any part of the salary that was due prior to the 15th. of March, 1919. Nor is anything left to inference.

Next, the defendant claims that the plaintiff's statement is insufficient because it does not expressly and distinctly aver performance of the contract. The plaintiff does allege that he continued in the employment of the company until the 30th of August, 1919 at which time one James H. Cullen took over the management, and he further avers that he "gave his full time and services to the company's operation." These averments expressly and distinctly show performance of the contract after March 15, 1919.

Again, the defendant claims that the statement is not self-sustaining, alleging that the statement does not aver that the period for which compensation is claimed was during the life of the defendant's operation. The plaintiff al-

leges that he gave his full time and services to the operation and that he continued in the employment of the defendant company up to and until the 30th of August, 1919, at which time one James H. Cullen took over the management of the aforesaid operation and continued to carry on the defendant's business; which averments are equivalent to an assertion that the plaintiff's claim is for services during the life of the defendant's operation.

I think the statement of claim is consistent, sufficient and self-sustaining and that it calls for an answer on the part of the defendant.

AND NOW JANUARY 3, 1921, the questions of law raised in the affidavit of defence are decided against the defendant, and it therefore may file a supplemental affidavit of defence to the averments of fact in the plaintiff's statement within fifteen days.

Weaver vs. Krapf

Statement of claim - Affidavit of defense - Counter-claim.

When the plaintiff's reply to the defendant's counter-claim is as specific as the counter-claim judgment will not be entered without a trial by jury.

Rule for judgment. No. 28, July Term, 1920.

J. O. Ulrich for rule.

A. D. Knittle, contra.

KOCH, J. January 3, 1921.

The reason assigned in support of this rule is, that, "The plaintiff does not deny in his reply the counterclaim contained in paragraph five of the affidavit of defence, which paragraph is as follows:- '5. The defendant avers

that the plaintiff is indebted to him in the sum of two thousand, twenty-eight and 53-100 dollars, with interest from May 3, 1920." According to the plaintiff's statement of claim he sues for two items, one a promissory note for \$280, dated May 5, 1914 and due July 5, 1914, and the other the sum of \$100 which it is averred defendant collected for the plaintiff while he was in the plaintiff's employ and failed to turn over to the plaintiff. In the affidavit of defense the defendant admits the promissory note but denies the other item of \$100 and sets up a counter-claim for two thousand, twenty-eight and 53-100 dollars. We will set out the defendant's counter-claim in his own language: "4. The defendant sets up against the claim of the plaintiff and against the plaintiff the following counter-claim:

"The deponent was employed by the plaintiff from May 1, 1913 to September 22, 1915, inclusive, a period of twenty-eight months and twenty-two days at a fixed salary of one hundred dollars per month, which the plaintiff agreed to pay the deponent, for which time the deponent was entitled to receive the full sum of two thousand eight hundred seventy-three and 33-100 dollars.

"The deponent received on account of said salary from the said plaintiff the sum of ten hundred and fifty dollars, as follows, from May 1, 1913 to May 1, 1914, the sum of fifteen dollars per week for the full period of fifty-two weeks or a total sum of seven hundred and eighty dollars; the balance of his salary was to remain in the hands of the plaintiff as part of his contribution for a partnership which was to be formed by the plaintiff, the deponent and Robert Trewren, but said partnership was never consummated.

"The deponent received from the plaintiff on account of his salary about May 1, 1914 the further sum of one hundred and twenty dollars as a credit on a note which deponent had given the plaintiff. The deponent received from the plaintiff on account of his salary during May, 1914 the sum of seventy-five dollars and on the same account during the month of June, 1914, the further sum of seventy-five dollars,

making a total receipt of ten hundred and fifty dollars, which deducted from the amount due the deponent leaves a balance of eighteen hundred twenty-three and 33-100 dollars upon which interest is calculated from September 22, 1915 to May 3, 1920, a period of four years, seven months and eleven days and amounts to five hundred and eighty-six dollars, which added to the principal, amounts to twenty-four hundred nine and 33-100 dollars from which the the deponent deducts the sum of three hundred eighty and 80-100 dollars the amount of the said note mentioned in paragraph 1 of the plaintiff's statement with interest thereon from May 5, 1914 to May 3, 1920, leaving a balance due from the plaintiff to the defendant of two thousand twenty-eight and 53-100 dollars, upon which balance the deponent claims interest from May 3, 1920."

The plaintiff's reply to the counter-claim "denies all of the allegations set forth in paragraph four of the defendant's affidavit of defence relating to the counter-claim, and further avers and says that Andrew L. Krapf was not employed by the plaintiff from May 1, 1913 to September 22, 1915, but admits that the defendant Andrew L. Krapf did work for the plaintiff from May 1, 1913 to May 30, 1914. The plaintiff further denies that the salary of the said Andrew L. Krapf was fixed at one hundred dollars (\$100) per month, but that on the contrary the defendant's salary was agreed upon by both parties to be sixty-five dollars (\$65.00) per month, and that at no time during the said period of hiring did his wages reach the amount of two thousand, eight hundred, seventy-three dollars and thirty-three cents (\$2873.33). The plaintiff further saith that the said Andrew L. Krapf was paid the full sum of sixty-five dollars per month, in weekly payments of fifteen dollars (\$15.00) per week to wit: From May 1, 1913 to May 1, 1914. The plaintiff further avers and says and expects to be able to prove that on or about the last week in April, 1914, the said Andrew L. Krapf wanted to quit work alleging that his salary was too small, whereupon the plaintiff allowed the

said Andrew L. Krapf the further sum of ten dollars (\$10.00) per month for the past twelve months or the total sum of one hundred and twenty dollars (\$120.00) which said one hundred and twenty dollars was credited upon a note of four hundred dollars (\$400) owed by the said Andrew L. Krapf to the said Edward E. Weaver, and which is the subject of the present suit in the plaintiff's statements contained. At the same time the plaintiff and the defendant further agreed that the future salary of the said Andrew L. Krapf should be seventy-five dollars (\$75.00) per month, and that thereafter the said Andrew L. Krapf worked but one month from the first day of May 1914 to the 30th. day of May, 1914, and the plaintiff avers that the full sum of seventy-five dollars (\$75.00) was paid to the said Andrew L. Krapf for the balance of the time he worked for the plaintiff." Plaintiff further replies to the counter-claim as follows:-

"2. The plaintiff further avers and says in answer to defendant's counter-claim that he never agreed to pay to the defendant the sum of one hundred dollars (\$100.00) per month at any time during the course of his employment, and that he never agreed that any portion of the defendant's salary should be retained or remain in the hands of the plaintiff as a part contribution for any partnership which was to be formed by the plaintiff, Andrew L. Krapf and Robert Trewren or by any other persons, nor any such money of the defendant's ever retained for that purpose.

"3. The plaintiff further avers and says that he is in no manner indebted to the defendant in any counter-claim but that on the contrary every cent of wages earned by the defendant has been paid by the plaintiff to the defendant, and that the defendant is indebted to the plaintiff for the amount set forth in the plaintiff's statement with interest."

In the language quoted the plaintiff meets every averment of the defendant concerning the defendant's counter-claim. In his fifth paragraph the "defendant avers the plaintiff is indebted to him" etc.,

whereas the plaintiff in the third paragraph of his reply says, "Plaintiff further avers and says that he is in no manner indebted to the defendant in any counter-claim," etc., and in the previous paragraph he sets forth why he is not indebted. The plaintiff's reply is at least as specific as the defendant's general allegation of indebtedness in the fifth paragraph of his affidavit of defence. All the issues between these parties are clearly made up by the pleadings and until a trial is had and the verdict of a jury rendered the case is not ripe for judgment.

AND NOW, JANUARY 3, 1921, the rule is discharged.

Palmer vs. Sanner Hardware Co.

Act of June 7, 1907, P. L. 440 - Issue at law - Equity jurisdiction.

The act of June 7, 1907, P. L. 440 provides that where a bill in equity has been filed and the jurisdiction is questioned such question must be determined by the court before merits are inquired into and if the court is of the opinion that a question of law exists the case must be certified into the law side.

Where a legal right is asserted it must be established at law before a court in equity will assume jurisdiction, unless there is a strong and mischievous case or pressing necessity which entitles the plaintiff to relief.

Bill in equity. No. 2, July Term, 1920.

Edgar Downey, O. E. Farquhar and C. M. Palmer, for plaintiff.

H. O. Haag and E. D. Smith, for defendant.

KOCH, J. September 13, 1920.

According to the bill of complaint, the complainant is the owner of a certain three story brick store and office building and lot or piece of ground on Centre Street in the city of Pottsville, which lot is bounded on the east by Centre

Street and on the north by property known as the Exchange Hotel, which hotel property was lately bought by the Sanner Hardware Company, Incorporated, said purchase being evidenced by a deed executed April 30th., 1920.

In the sixth paragraph of his bill the plaintiff says, "That there is an alley or passage way about three (3) feet wide on said property of the Sanner Hardware Company, Inc., extending along the northern boundary line of his property, hereinbefore mentioned, to the depth of about one hundred and twenty-five (125) feet from Centre Street. This alley or passage way is separated from his property by a fence and the brick wall of the building erected on his property, hereinbefore described, but there is an opening or entrance from his property to the alley hereinbefore mentioned." The next succeeding paragraphs to the bill are as follows:

"7. That he and his predecessors in title have used the said alley or passage way adversely, openly and notoriously for over twenty-five (25) years for the purpose of ingress, regrees and egress to and from his property, and, therefore, has a clear right of way over the said alley or passage way.

"8. That the defendant is now improving and renovating the building upon his property and it or its contractor, Gordon A. Nagle, has closed the entrance to said Centre Street by nailing boards across the same and have threatened to build a stair case and other structures upon the same which will obstruct and render useless the right the plaintiff has acquired to the said alley or passage way.

"9. That he has not an adequate remedy at law."

Upon presentaton of the bill a preliminary injunction was issued, and after a hearing on motion to continue or dissolve, after five days, the injunction was continued. Subsequently the defendants filed an answer utterly denying the plaintiff's claim to the right of way over the ground of the Sanner Hardware Company, and in the ninth paragraph of their answer say, "We deny that the plaintiff has not an adequate remedy at law and aver that plaintiff's suit should have been brought at law, wherein the remedy is adequate;

and we pray this honorable court to award an issue to try the question of fact of the plaintiff's right to the use of said alley or passage way." We are also asked in the answer to dismiss the bill of complaint. In the first section of an act relating to equitable proceedings, approved the 7th. day of June, 1907, P. L., 440, it is provided," That when a bill in equity has been filed in any court of this commonwealth, if the defendant desires to question the jurisdiction of the court, upon the ground that the suit should have been brought at law, he must do so by demurrer or answer, explicitly so stating, or praying the court to award an issue or issues to try questions of fact: ****."

The plaintiff claims that our jurisdiction of this bill must be determined solely from the bill itself, and points to the case of Naomi Coal Co., v. Moore, 18 D. R., 617 wherein we find as follows: "If the facts stated therein are such as to entitle the plaintiff to equitable relief prima facie, the defendant cannot oust the jurisdiction by his answer denying the facts stated in the bill. If the bill gives the court jurisdiction, neither demurrer nor answer can defeat it. If jurisdiction be entertained, an answer denying the allegations of the bill raises an issue to be decided upon hearing. After hearing on the merits, the question of jurisdiction depends on the proofs. The facts then found may oust the jurisdiction: Adams Appeal, 113 Pa., 449; Drake v. Lacoe, 157 Pa., 17; Ahl's Appeal, 129 Pa., 49; Silvis v. Clous, 1 Pa. Superior Court, 41; Smith v. Carter, 219 Pa., 315." He further calls our attention to the cases of Winters v. Cohen, 20 D. R., 751; Eastern Pennsylvania Power Co., v. Cistone, et al., 23 D. R. 121; Lehigh Valley Railroad Co., v. Ridgewood Coal Co., 16 Luzerne Legal Register Reports, 7 and Dodson v. Wildoner, 17 Luzerne Legal Register Reports, 416.

But I think the language quoted is not fully supported by the Supreme Court cases referred to. In Adams's Appeal, 113 Pa., 449, 455, Mr. Justice Sterrett said, "The main questions presented by the second and third specifications is whether the learned judge erred in dismissing appellant's bill

for want of jurisdiction. This question should be determined, not by what may have been shown by the answer or testimony adduced in support thereof, but by what appears on the face of the bill itself. If the averments therein contained, assuming them to be true, present a case of which equity has either concurrent or exclusive jurisdiction, the bill should not have been dismissed, especially in view of the fact that the appellees did not object in limine by a plea or otherwise to the jurisdiction of the court. While it is true that manifest want of jurisdiction may be taken advantage of at any stage of the cause, the court will not permit an objection to its jurisdiction to prevail in doubtful cases after the parties have voluntarily proceeded to a hearing on the merits, but will administer suitable relief; Story's Eq. Jur. Section 464. As was said in *Sunbury & Erie R. R. Co., v. Cooper*, 9 Casey, 278, if the court in which the suit is brought has jurisdiction of the cause of action, both at law and in equity, it may proceed to give relief, unless the bill be demurred to on the ground that the proper remedy is at law." In *Drake v. Lacoe*, 157 Pa., 17, 39, the Supreme Court quotes most of what I have just quoted from *Adam's Appeal*. In *Smith v. Carter*, 219 Pa., 315, 319, the Supreme Court said, "The conduct of the appellant, as shown by the record, did not warrant the court in scrutinizing too closely its jurisdiction. They had ample opportunity to be heard, both as to the question of jurisdiction and on the merits of the case. Instead of taking advantage of the opportunity thus afforded them they have sought in every step they have taken in the cause simply to prevent a hearing on the merits. After the court had refused to strike off the service, and they found themselves within its jurisdiction, they then had an opportunity to raise the question whether equity would take cognizance of the case presented by the bill. This was the proper course for the appellants to pursue if they wished to raise the question of jurisdiction. *Adams's Appeal*, 113 Pa., 449. After the several steps taken in the court below to dispose of the case on its merits, as shown by the record,

the appellants are too late in raising the question of jurisdiction. *Adams's Appeal*, 113 Pa., 449; *Fidelity Title and Trust Co., v. Weitzel*, 152 Pa., 498; *Drake v. Lacoe*, 157 Pa., 17." Here the defendants "object, in limine" by answer that there is an adequate remedy at law as they are required to do by the Act of 1907, P. L., 440. In the second section of the act we find, "If a demurrer or answer be filed, averring that the suit should have been brought at law, that issue shall be decided in limine before a hearing of the cause upon its merits." The defendants could have demurred at the very threshold of the case, but they preferred to wait to raise the question in their answer which could be filed any time within thirty days. Therefore, the issue raised by the answer is to be decided in limine before a hearing of the cause upon the merits. How can we determine what the issue is, unless we look at the answer? The answer does not admit a prescriptive right to an easement in the plaintiff. On the contrary it denies such right and thus presents an issue, and they say that issue is not within our jurisdiction to determine; that it presents an issue at law where the remedy is adequate. But, if notwithstanding the fact that the issue is here raised by the answer, we are obliged to look only into the bill to ascertain whether we have jurisdiction of the cause, then let us look at the bill. On the face of the bill it is made to appear that our jurisdiction in this case must turn upon the plaintiff's actual right in law, a right which has not been established at law nor conceded by the defendants. The plaintiff claims a prescriptive right of way over the defendant's land. As in *O'Neil v. McKeesport* 201 Pa., 386, the bill presents a controversy over a title at law. And, until such title has been established at law, a court in equity should assume no jurisdiction, unless there be a strong and mischievous case or pressing necessity which entitles the party to call to his aid such jurisdiction. *Rhea v. Forsyth*, 37 Pa., 503. I see no difference, so far as the equity powers of the court are concerned, whether a nuisance be public or private. In *Newcastle v. Raney*, 130 Pa., 546,

Mr. Chief Justice Paxson, at page 562 said, "We do not question the power of a court of equity to restrain and abate public nuisances. This is settled by a list of decisions. But the authorities uniformly limit the jurisdiction to cases where the right has first been established at law, or is conceded. It never was intended and I do not know of a case in the books where a chancellor has usurped the functions of a jury and attempted to decide disputed questions of fact and pass upon conflicting evidence in such cases." And again on page 564, "The city may, if it sees proper, proceed against defendant by an indictment or by a suit at common law. When the right is thus settled then, but not until then, will jurisdiction attach in equity."

Mr. Justice Mitchell, in *Mowday v. Moore*, 133 Pa. 611, quotes from *Adams Equity*. "There is a jurisdiction in equity to enjoin, if the fact or nuisance be admitted or established at law, whenever the nature of the injury is such that it cannot be adequately compensated at law, or will occasion a constantly recurring grievance." One has a constitutional right to have his legal rights determined at law, and in no other way. "Where rights which are legal are asserted on one side and denied on the other, the remedies are at law. They cannot be settled in equity forms; this is undoubtedly the general rule." *Washburn's Appeal*, 105 Pa., 480. In *Delaware etc. R. Co., v. Newtown Coal Co.*, 157 Pa., 314, the lower court was reversed for granting a preliminary injunction where the defendant undertook to erect a building upon the plaintiff's alleged right of way, holding that it was error to award a preliminary injunction until the disputed right had been brought at law. In *O'Neil v. McKeesport*, 201 Pa., 386, which was an alleged easement, the bill was dismissed without prejudice to the rights of the parties at law.

Where a person claims title to an easement in an alley by adverse user for more than twenty-one years, and the owner of the land denies title and alleges that the user was permissive only, equity has no jurisdiction. The remedy is

at law. *Codino v. Kane*, 26 Superior Court, 596.

That a plaintiff is not entitled to remedy by injunction to restrain the continuance of a nuisance, when his right has not been established at law, or is not clear, and that this doctrine has been steadily maintained in this state, are reasserted in *Gorman v. McDermott*, 42 Superior Court, 516. But where the plaintiff's right is clear, it is not necessary that it should first be established at law. *Miller v. Lynch*, 149 Pa., 460; *Manbeck v. Jones*, 190 Pa., 171.

The defendants challenge the plaintiff's alleged prescriptive right to the easement over their land, when, in accordance with the requirements of the Act of 1907, they pray the court to award an issue to try the question of such alleged prescriptive right, thereby plainly not conceding but denying the plaintiff's alleged right. And we cannot deprive the defendants of their right to have that question determined by a court of law. We see no reason why we should hold this bill pending the determination of the question at law. Besides, the act referred to requires us to certify the cause to the law side of the court.

AND NOW, SEPTEMBER 13, 1920, this case is certified to the law side of the court at the cost of the plaintiff.

Hinks vs. Hinks

Divorce - Act of June 25, 1895, P. L. 309 - Duties of master.

The act of June 25, 1895, P. L. 309 gives a husband the right to obtain a divorce where the wife, by cruel and barbarous treatment, or indignities to his person, rendered his condition intolerable and life burdensome, but the husband must prove that the conduct of his wife rendered his condition intolerable and life burdensome as the result of her cruel and barbarous treatment and the evidence must show such a course of conduct.

The master must make specific findings of fact respecting the establishment of the cause of divorce which is alleged in the libel; that the libellant has had a residence in the county for a length of time sufficient to give the court jurisdiction, he must satisfy himself, by personal inquiry of the fact of residence and report to the court that the residence as stated in the libel is bona fide and correct as well as the time during which such residence continued.

Libel in divorce. No. 1, May Term, 1920.

Henry Houck, for libellant.

BERGER, J. January 17, 1921.

The libellant brought his action of divorce under the provisions of the Act of June 25, 1895, P. L. 309, which provides as follows:- "Section 3. Where a wife shall have, by cruel and barbarous treatment or indignities to his person, rendered the condition of her husband intolerable, or life burdensome: Provided, That in case of divorce under this act, if the application shall be made on the part of the husband, the court granting such divorce may allow such support or alimony to the wife as her husband's circumstances may admit of, and as said court may deem just and proper." A husband, in order to obtain a divorce under this section of the act, must prove that the conduct of his wife rendered his condition intolerable and life burdensome, as the result of her cruel and barbarous treatment, which must be established by the evidence showing such a course of conduct: Cantor, Appellant, v. Cantor, 70 Pa. Superior Ct., 108, 111.

The parties to this action were married when both knew that a cause of discord existed between them. The libellant's brother sometime before the marriage was contracted had shot and killed his fiancé, who was the sister of the respondent. The respondent has made no defense to this action and the testimony of the libellant in its main features is practically uncorroborated. It must be kept in mind, as is stated in *Aikens v. Aikens*, Appellant, 57 Pa. Superior Ct. 424 426, that "The courts are without jurisdiction to grant a divorce for any cause not expressly authorized by statute, and there is no statute which authorizes a court to decree a divorce upon the ground that the ends of justice will thereby be furthered, or that the parties had become estranged and there is no possible chance of their becoming reconciled."

The libellant has been paying his wife the sum of thirty dollars per month under an order of this court for the support of herself and their child. Should the court hereafter conclude that the evidence establishes a cause for divorce it would be proper, under the circumstances of this case, to allow alimony to the wife according to the "husband's circumstances." The evidence does not disclose what his present circumstances are.

The master has made no specific finding of fact respecting the establishment of the cause of divorce which is alleged in the libel. This is an absolute prerequisite to our consideration of his report: *Dean v. Dean*, 14 Schuylkill Legal Record 82, 28 D. R. 377. His finding on this point must be definite and particularized: *Murray v. Murray*, 29 D. R. 257. Nor is any specific finding of fact made by the master that the libellant has had his residence in this county for a length of time sufficient to give this court jurisdiction. Rule 14, page 35, of our Rules of Court requires the master, in addition to the evidence introduced to establish residence, to satisfy himself by personal inquiry of the fact of residence, and to report to the court, that the residence as stated in the libel is bona fide and correct, as well as the time

during which such residence has continued. The discharge of this duty by the master should in each case be stated in the form of a finding of fact.

For the reasons above stated this case must be remanded to the master, who may take further testimony if he deems it necessary, under the power conferred upon him by Rule 16, page 35, of our Rules of Court, or upon the application of the libellant, after due notice shall have first been given to the respondent. When the case is finally closed it is the duty of the master to file a report stating his essential findings of fact and his conclusions of law in separate paragraphs. Then the duty will devolve upon this court to determine whether the cause of divorce, as set out in the libel, has been established by the evidence, and if the divorce is granted, to allow alimony.

And now, January 17, 1921, this case is remanded to the master for such further action as he may deem proper, not inconsistent with the views expressed in this opinion.

McGonigle vs. Saint Clair Coal Co.

Duty of coal operator to lower owner - Storms - Form of action.

The owner or operator of a coal mine may deposit refuse upon his own land; if it is carried into a stream by extraordinary flood and spread over other land the operator is not responsible in damages to the lower owner, but if such refuse is deposited on land of the operator from which it is washed into the stream by ordinary storms or if he deposits such refuse directly in the stream, the operator is liable for damages sustained by such negligence.

The deposit of such refuse and resulting damage is a private nuisance and the proper remedy is an action for trespass.

Bill in Equity. No. 2, March Term, 1918.

E. D. Smith and J. M. Boone, for plaintiff.

R. R. Koch and J. F. Whalen, for defendant.

BERGER, J., October 18, 1920.

When this case came before the chancellor, after having been remanded by the order of the Superior Court made in 71 Pa. Superior Ct. 480, the plaintiffs offered no additional testimony and expressly refused to offer any testimony to prove the monetary value of their damages. The defendant's offers of testimony were rejected, hence the case rests upon the testimony originally taken. After the conclusion of the hearings before the chancellor, he directed the entry of a decree nisi dismissing the bill in accordance with the views expressed by him in the supplemental opinion filed December 22, 1919, which is reported in 15 Schuylkill Legal Record 217, 29 D. R. 767. To this action of the chancellor twenty-three exceptions have been filed by the plaintiffs. The first fourteen exceptions are a mere repetition of exceptions, the refusal to sustain which was assigned as error on the appeal to the Superior Court. The assignments of error, based on these fourteen exceptions, were not passed on by that court. The case was remanded by sustaining the 18th, 19th and 20th assignments of error. By exceptions Nos. 15 to 20, both inclusive, excerpts taken from the chancellor's supplemental opinion, are assigned either as error of fact or of law. The construction placed upon Equity Rule 62 in *Pittsburgh Stove & Range Co. v. Pennsylvania Stove Co.*, 208 Pa. 37, that the judge sitting as chancellor "is required to answer specifically requests for findings of both fact and law," and that "he should also find and state in connected and paragraphic form his findings of fact and conclusions of law" was approved in *Hastings Water Co., Appellant, v. Hastings*, 216 Pa. 178. We are of the opinion that the equity rules do not authorize the filing of any exceptions, either of fact or of law, based upon excerpts extracted from the chancellor's opinion. The 21st. exception is a mere duplication of the 14th. For the reasons stated no further reference to the first twenty-one exceptions will be made. The 22nd. and the 23rd. exceptions are to the effect that the chancellor erred in directing the entry of a decree nisi dis-

missing the bill. These raise the real question now to be determined.

The preliminary injunction granted by this court and reinstated by the order of the Superior Court, which issued in conformity with the first paragraph of the plaintiffs' prayers for relief, restrains the defendant from diverting the water of Mill Creek from its natural channel. We are in accord with the views expressed in the chancellor's opinion in reaching the conclusion that to this extent the preliminary injunction cannot be made permanent.

It is deemed desirable to summarize the reasons why the preliminary injunction, in so far as it is based on the second paragraph of the plaintiffs' prayers for relief, cannot, in our opinion, be made permanent. This part of the restraining order prevents the defendant, after having taken the water from the Mill Creek for its own use as a riparian owner, from discharging it at any point upon its own property "where the same will flow or run to, on to or upon the lot and dwelling house" of the plaintiffs. Thus the plaintiffs have prevented the defendant from using its slush or settling dam, erected on its own land for the operation of its colliery thereon, just as effectually as though they had made the erection or the operation of the dam by the defendant a ground of their complaint, and had obtained a restraint of its use. This is recognized by the plaintiffs, as is shown by their motion, filed after the case had been remanded to this court with a procedendo, to have a permanent injunction entered restraining the defendant from discharging the water taken by it from the Mill Creek and used in its colliery into "the slush dam of the defendant." The erection or the operation of the slush dam is not a ground of complaint, and its very existence is negatived in the fifth paragraph of the plaintiffs' bill by the allegation that the water or slush pumped from the defendant's breaker is discharged "on to a culm or coal dirt bank," whence it flows over the surface of the ground to, over and through" plaintiffs' lot and "into the house erected thereon." No negligence in the erection

or construction, or in the operation of the slush dam is alleged. For this reason it seems to us that the plaintiffs, in asking the restraint of the dam's use, are seeking equitable relief upon a ground not averred in their bill of complaint, and that their bill must fall for failure of the proofs to correspond with the allegations.

The output of the breaker was coal of various sizes prepared for market; refuse of a coarse nature, consisting of rock and slate; and refuse consisting of particles of rock, slate and coal, carried in solution or in conjunction with the water which was discharged from the breaker, after having served the purpose of aiding in the separation of the refuse from the coal by the mechanical means employed in the breaker. The finer refuse was referred to by all the witnesses as slush and was defined by James McGonigle, one of the plaintiffs, as fine coal or the washings of coal (95a). The proportion of fine coal to the water is unknown, because no attempt to establish it was made by the testimony. The water used in washing the coal was obtained from the Mill Creek, which bounds the land from which the coal prepared in the breaker is mined, and from the accumulations of water in the mine itself, in approximately equal quantities. There was therefore no water not passing through, or originating upon, the defendant's land itself, brought upon it by artificial means for use in the operation of the colliery. The slush was pumped into a dam.

The slush dam was so located on the defendant's property that the water percolating through the breast of the dam flowed upon the watershed of the Little Wolf Creek. There is no evidence that the dam could have been located so that the percolated water would have flowed upon the watershed of the Mill Creek. This percolating water was not diverted after it left the dam, from the Mill Creek watershed to the Wolf Creek watershed, but the trenches that were dug and maintained by the defendant were dug and maintained for the purpose of delivering this water at one point on their own property into the channel of the Little

Wolf Creek (171 and 172a). James McGonigle, one of the plaintiffs, was present when the defendant caused these trenches to be dug about two years before the injury complained of, and made no objection. The slush was pumped into this dam for the purpose of allowing it to settle, and to retain the residuum, after the water had percolated through the dam, behind its walls. The object in erecting the dam was to secure the refuse upon the defendant's own property, so as to prevent injury to lower owners. This paragraph and the one immediately preceding are stated as findings of fact supplemental to the findings of fact stated by the chancellor.

Since the introduction of the use of water in the preparation of anthracite coal for market, which for a number of years has been the common method employed in breakers and washeries for the preparation of such coal, it necessarily follows that the coal dust, resulting from breaking the coal in the breaker, and from running it over jigs or screens, as well as the smaller particles of coal, slate and rock produced by the process of preparation, pass out of the breaker in the form of polluted water of a greater or lesser degree of density. Of this refuse or slush disposition must be made by the operator, and since he cannot discharge it directly into running streams, because of the solid contents contained in the admixture, without incurring liability to lower owners, some other method of disposition must be adopted. The operator of a colliery cannot pump this refuse upon the surface of his land, because, being largely composed of water, it would ordinarily flow, if unrestrained by artificial means, to a lower level, or at least it would so find lodgment temporarily as to be subsequently moved by the action of ordinary storms to the lands of lower owners, thus causing actionable injury to them.

Assuming the erection of a watertight dam for holding such refuse to be possible, the water would naturally overflow the walls of the dam, unless it were disposed of by evaporation, or the dam was of extraordinary capacity, or

was operated only at intermittent periods. Short of complete disposition by evaporation, disposition by percolation or filtration seems to be the only other practicable method. The case at bar, if the pleadings raise it, presents for determination the question of the measure of duty resting upon the operator in the disposition of such liquid refuse, that is, the degree of care which the operator must exercise in its disposition in order to avoid liability to lower owners.

The contention of the plaintiffs is that an absolute duty rests upon the operator, the defendant in this case, to so dispose of this refuse that none of it can, under any circumstances, find its way upon their property. Hence it is that the bill of complaint does not allege the existence of the defendant's slush or settling dam erected on its own land, or negligence in its operation. For the same reason, doubtless, there is a failure to allege that the Little Wolf Creek flows through the plaintiffs' property, and that the defendant is an upper riparian owner on the same stream. Consequently the plaintiffs are content with the averments in their bill that the defendant, by means of a pump, diverts the polluted water from Mill Creek, and after its further pollution by its use on its own property, to which it is first diverted, then diverts it to a point from which it flows upon the property of the plaintiffs to their injury, without any reference either to the course of the flow after it has been discharged into the defendant's slush dam, or the circumstances attending its flow thence upon the plaintiffs' property. In other words, it is alleged that the defendant uses some of the water of Mill Creek in the prosecution of its lawful business in the development of its own land, and after its use permits all or some of it to flow upon the plaintiffs' property, to their damage, and hence liability is incurred.

The duty owing by an operator of a colliery to a lower owner, to secure the refuse from his colliery upon the land from which it originates, is stated in *Hindson v. Markle*, 171 Pa. 138, 143, to be, * * * * "that the owner of coal mines may deposit the refuse and culm upon his own lands. That

if the material is carried by extraordinary floods into a stream, which runs through the land of a lower owner, and from thence spreads over such land, the owner of the coal lands is not responsible in damages to the lower owner for the injury thus sustained. But if the refuse is placed on his own land in a position where it is washed into the stream by ordinary storms, or if he deposits his refuse and culm directly in the stream, and damage thereby results to the lower owner, the mine owner or operator is liable for the damage and injury thus occasioned to the lower owner." This is but an application of the principle "that an action does not lie for a reasonable use of one's right, though it be to the injury of another. For the lawful use of his own property, a party is not answerable in damages, unless on proof of negligence," stated in *Railroad Co. v. Yeiser*, 8 Pa. 366, to the business of mining.

If the slush pumped by the defendant into its dam be regarded as refuse, the duty of the defendant to protect lower owners from it is defined in *Hindson v. Markle*, *supra*. That case was an action of damages for injuries sustained by a lower owner by reason of refuse having been cast upon his land by water used in washing coal, and it was shown that the injury was the result of a direct deposit upon the plaintiff's land. The seventh point submitted by the defendant, that since the undisputed evidence showed that the mining and preparation of the coal was done upon its own land, upon which the refuse was deposited, and that the refuse was cast upon the plaintiff's property by the action of unusual storms and freshets, there could be no recovery, was refused, because the evidence on that phase of the case was not undisputed, as the point stated. On appeal, the action of the court below in refusing the point was affirmed for the reason given by the trial judge. There was no evidence that any effort had been made to restrain the water by the erection of a dam, or that its flow upon the plaintiff's lot had occurred only during periods of high water or flood, but, on the contrary, the evidence was that the flow

of the water to the plaintiff's injury had been direct, unrestrained and continuous for several years prior to the commencement of the action.

If we accept James McGonigle's definition of slush it is refuse resulting from the operation of a colliery. The owner's duty to confine refuse upon the land which it originates is relative and not absolute. Does the fact that it is, or seems to be, practicably impossible for an owner to secure slush upon his own premises so that the flow of some water, polluted to some degree, from the dam at all times whether ordinary or extraordinary weather prevails, cannot be altogether prevented, make inapplicable the principles stated in *Harvey v. Susquehanna Coal Company*, Appellant, 201 Pa. 63; to the facts of this case? It appears to us that if the operator of a colliery, as was held in the case last cited, is not responsible, in the absence of negligence, for injury resulting from a failure to prevent large quantities of coal dust necessarily created by the artificial breaking, separation and preparation of coal in a breaker from being blown by the winds upon the property of another to his injury, he would also be exempt from liability in the absence of proof of negligence for the flow of polluted water from his premises under the circumstances of this case. If the fact that the water used by the defendant in washing coal as it passes through the breaker will flow constantly under all ordinary conditions of the weather from the dam erected for the retention of the slush thus produced, excepts this case from the operation of the principles laid down in *Hindson v. Markle*, and in *Harvey v. Susquehanna Coal Company*, *supra*, and subjects the owner in the use of water in the manner in which this defendant has used it, to restraint by injunction, without either allegation or proof of negligence respecting the means adopted for its retention upon the land of its origin, then the use of water in the preparation of coal is practicably impossible, in our opinion.

The plaintiffs, in the written argument filed in support of the present exceptions, contend that the bill of complaint

does aver the pollution of the Little Wolf Creek and an increase in its flow by the acts of the defendant, but an examination of the bill makes it entirely clear, as is stated by the chancellor in his supplemental opinion, that the plaintiffs have not complained, either of an increased flow of water in the Little Wolf Creek, or of its pollution. In the written brief filed in support of their exceptions at the first hearing of this case before the court sitting in banc, the defendant said: "The plaintiffs' bill does not raise the question of pollution of the water but a diversion of water from one channel to that on which the defendant's property is located and increasing the quantity of water thrown on to his property with the consequent damage as stated and proved," and in the written brief now before us, notwithstanding the plaintiffs' above stated contention, we find the following:

"On page 11 of the Chancellor's supplemental opinion, the statement is made by the court, speaking by Berger, J., that

"The plaintiffs have not alleged increased flow or pollution of Little Wolf Creek as a ground for relief in their bill."

"The plaintiffs never alleged as a ground of equitable relief either increased flow or the pollution of Little Wolf Creek, but they have alleged and have proven, and the Chancellor has found, that the flow of polluted water on to the plaintiffs' property has been increased and has done the damage alleged in the plaintiff's bill."

It is undisputed that for a period of five years prior to the injury complained of, the water from the dam percolated through the walls of it and flowed thence through a channel caused by erosion, and another one later dug by hand, into the Little Wolf Creek, on the defendant's property, and that this water was not entirely free from sediment. All that is claimed by the defendant (and this is not controverted by the plaintiffs) is that this water contains proportionately less sediment than that taken from the Mill Creek, and that the Little Wolf Creek, into which it flowed, was an impure stream long before the injury complained of,

and that prior to the time when the dam, from which the water percolated was erected, the plaintiffs had suffered, without objection, a considerable quantity of the water from Mill Creek, charged with more sediment, to be discharged into the channel of the Little Wolf Creek upon their own property, so that it flowed through it in the channel of the creek to a point below it, where it was used by the person who had diverted it in the preparation of his coal, and that the slush dam was erected and the pumps installed for pumping the slush into it, with the plaintiffs' knowledge. For the reasons stated in the chancellor's supplemental opinion under the pleading and the evidence in this case, we are of the opinion that no decree ought to be made which would restrain the defendant from the discharge of the water percolating or flowing from its slush or settling dam into the Little Wolf Creek, on its own property.

The damage which the plaintiffs have sustained is not directly due to the taking of water by the defendant from the Mill Creek, nor to the discharge of that water by the defendant after its proper and lawful use in the preparation of coal taken from its own land "on to a culm or coal dirt bank" whence it "flows over the surface of the ground to, over and through the lot" of plaintiffs, but is caused by the erection and operation of a dam erected by the defendant on its own land, intended to retain the slush which is pumped into it for the purpose of avoiding injury to lower owners. The defendant has not discharged the water taken from the Mill Creek upon a culm or coal dirt bank, but into a dam. The mere taking of the water from that creek and the erection of the dam was the exercise of a right which the defendant had and of which the plaintiffs cannot complain. The dam, which was built in the exercise of a right, is neither a public nor a private nuisance or wrong. The overflow of the plaintiffs' lot resulted entirely from the operation of the slush dam. The operation of the dam, and not its erection, was the means wherefore the consequential damages were produced. Prior to the passage of the Act of May 25, 1887,

P. L. 271, an action of trespass on the case, and not of trespass, would have been the proper one for the recovery of the damages sustained by the plaintiffs: *Meyer v. Horst*, 106 Pa. 552, 557.

The dam was necessary to the natural use and enjoyment of defendant's property. The deposit of the refuse from the coal prepared in the breaker was equally without right, if directly deposited or discharged into a stream, whether that stream was the one from which the water used in preparing the coal was originally taken or not. The fact that the combined volume of water originally made up in about equal parts of water containing muck, silt and culm, and that which did not, was, after it left the defendant's slush or settling dam, less polluted, or carried a smaller percentage of refuse than that part of the water which was taken from the Mill Creek, is persuasive merely and not conclusive that if it had been possible to assemble the water percolating from the breast of the slush dam at one point, and thence discharge it into the Mill Creek by mechanical means, a quantity of refuse greater than that originally contained in the water taken from the Mill Creek would not have been discharged into that creek.

What we have endeavored to show is that the injury which the plaintiffs have sustained results from the acts done by the defendant which are necessary to the development and enjoyment of its own property, and that these acts are not in the nature of a direct trespass by the defendant upon the plaintiffs' property, nor equivalent to an appropriation of any part of the plaintiffs' property to the defendant's use. Neither *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, nor *McCune v. Pittsburgh & B. C. Co.*, Appellant, 238 Pa. 83, are regarded by us as controlling in this case. The former is strongly relied upon by the defendant, and the latter by the plaintiffs. In the *Sanderson* case the sulphur water coming from the opening and operation of a mine flowed naturally or by gravity into a stream which was the natural watercourse for the drainage of the

mineral land and rendered impure the water in the stream for the use of the lower riparian owners. This was held to be *damnum absque injuria* upon the ground that the discharge of the water from the mine in its natural course was necessary to the enjoyment of the land itself. In the McCune case water pumped from a mine was not permitted to seek its own natural level, but was discharged at a higher level at a point which did not form the natural drainage point of the mine, whence it flowed into a pure stream to the damage of the complainant. It is to be noted that the case at bar differs from it in that the water used in washing or preparing the defendant's coal is not pumped into the slush or settling dam of the defendant for the purpose of its disposition, but because the slush resulting from the preparation of the coal, of which the water is a component part, must be disposed of so as to avoid, by the exercise of reasonable care, injury to lower owners. An application of the principle of *Hindson v. Markle*, *supra*, to the solid portion of the refuse, and the application of the principle of the McCune case to the liquid contained therein, seems to be impracticable, and the whole mass must therefore, in our opinion, be regarded as refuse. In the McCune case, too, there was no attempt made either to restrain or to purify the water before its discharge into a watershed other than that of its origin. It seems to us that in all the cases relied upon by the plaintiffs to sustain their contention that they are entitled to equitable relief, there either was a direct trespass upon the complainant's land which resulted in the appropriation of their property to the alleged wrongdoer's own use, or else the injury complained of was not the result or consequence of the use made by the party charged with the wrong, of his own property, in such manner as was necessary to secure its natural use and enjoyment.

The maintenance and operation of the slush dam by the defendant, even though it had been a ground of complaint, is at the most but a private nuisance. Speaking of the equitable remedy by injunction in such cases Stewart, J.,

is not an action of trespass in the case, and not of trespass to land, but the proper one for the recovery of the damages sustained by the plaintiffs. *Neyer v. Horst*, 106 Pa. 222, 223.

The fact that the defendant is the natural use and enjoyment of its mining property. The deposit of the refuse from the defendant in the stream was equally without fault or neglect on the part of the defendant. It was discharged into a stream, and the stream was the one from which the water was being taken. The fact that the water was originally taken from the stream, and the fact that the water was originally made of water containing much silt and mud, and that the water was, after it left the defendant's property, carried in a smaller quantity of water than that part of the water which was taken from the Mill Creek, is persuasive merely and not conclusive that it has been possible to assemble the water from the stream to the stream at one point, and to discharge it into the Mill Creek by mechanical means, a quantity of water greater than that originally taken from the water taken from the Mill Creek would be discharged into the Mill Creek.

It is to be noted that the injury to the plaintiffs has resulted from the acts of the defendant which are necessary to the development of its own property, and that these acts are not in the nature of a direct trespass by the defendant upon the plaintiffs' property, but equivalent to an interference with part of the plaintiffs' property to the extent that the *Summit Chair Coal Co. v. Sanderson*, 10 Pa. 222, 223, and *McGaughey v. Pittsburgh & B. C. Co.*, 10 Pa. 222, 223, are regarded by us as controlling in this case. The former is strongly relied upon by the defendant, and the latter by the plaintiffs. In the *Sanderson* case the defendant was found to be the owner and operator of a mine, and the defendant was found to be the owner of the mine.

mineral land and rendered impure the water in the stream for the use of the lower riparian owners. This was held to be *damnum absque injuria* upon the ground that the discharge of the water from the mine in its natural course was necessary to the enjoyment of the land itself. In the *McCune* case water pumped from a mine was not permitted to seek its own natural level, but was discharged at a higher level at a point which did not form the natural drainage point of the mine, whence it flowed into a pure stream to the damage of the complainant. It is to be noted that the case at bar differs from it in that the water used in washing or preparing the defendant's coal is not pumped into the slush or settling dam of the defendant for the purpose of its disposition, but because the slush resulting from the preparation of the coal, of which the water is a component part, must be disposed of so as to avoid, by the exercise of reasonable care, injury to lower owners. An application of the principle of *Hindson v. Markle*, supra, to the whole portion of the refuse, and the application of the principle of the *McCune* case to the liquid contained therein, seems to be impracticable, and the whole mass must therefore in our opinion, be regarded as refuse. In the *McCune* case, too, there was no attempt made either to restrain or to purify the water before its discharge into a water-course other than that of its origin. It seems to us that if all the cases relied upon by the plaintiffs to sustain their contention that they are entitled to equitable relief, there either is a direct trespass upon the complainant's land which results in the appropriation of their property to the alleged use of the defendant, or else the injury complained of was not the result, or consequence of the discharge made by the party charged with the wrong, of his property, in such manner as was necessary to secure the use and enjoyment of the land dam by the defendant. Speaking of the defendant, even the

in *Vandivort, Appellant, v. Hunter, et ux.*, 265 Pa. 585, said: "What we have called attention to is more than sufficient to show that the case was brought in the wrong forum; the right asserted may have been clear, but the facts on which the right to charge the defendant with liability rested, were denied and contested. In addition, it abundantly appears that the injury complained against was a matter of several years' standing when the proceeding was begun, a fact wholly inconsistent with imminency of threatened danger that was not capable of adequate compensation in money. The case presented no such facts as called for the intervention of 'the swift hand of the chancellor,' nor such as avoided the limitations restricting equity jurisdiction in cases of this kind where the right has first been established at law or is conceded. *New Castle v. Raney*, *supra*. Had the selection of the equity forum been objected to by demurrer or otherwise, the objection must have been sustained; but the selection having been acquiesced in by the defendants and the case having been proceeded with by consent of the parties, we see no good reason why it should not now be carried to its ultimate conclusion notwithstanding, especially in view of the disposition of it we purpose making." And in *Hieskell v. Gross, et al.*, 7 Phila. 317, Paxson, J., in speaking of the duty to grant injunctions upon a mere showing of a violation of a legal right, said (319): "It is not enough to show the violation of a legal right, to entitle the party injured to an injunction. If it were, injunctions would fall upon this community like snow flakes, bringing business of almost every description to a stand. Our courts of law would be to a great extent deserted, and the trial by jury, which, with all its defects, is nevertheless our great protection to persons and property, would fall into comparative disuse."

For the reasons stated, in addition to those stated in the chancellor's supplemental opinion, all the exceptions now before us must be dismissed.

D E C R E E

And now, October 18, 1920, exceptions dismissed. The prothonotary is hereby directed to enter the decree nisi, dismissing the plaintiffs' bill at their cost, as the final decree of this court.

Bakunas vs. Phila. & Reading C. & I. Co.

Compensation - Act of 1919, P. L. 665, Section 427 - Credibility of witness.

Section 427, of the Act of 1919, P. L. 665 provides that exceptions to findings of fact may allege that such findings are not supported by competent evidence.

In compensation cases the credibility of the witnesses is for the referee or the Board and the court cannot disturb findings of fact by either where there is sufficient evidence to sustain the findings. Appeal from Compensation Board. No. 78, September Term, 1920.

Whalen & Ellis for appellant.

KOCH, J. November 1, 1920.

The alleged ground of this appeal is that the award is unsupported by competent evidence. The claimant was employed as a coal miner at the defendant's Shenandoah City Colliery. He claims to have received an accidental injury to his left eye while at work on the afternoon of January 13th., 1919. In the fifth paragraph of his claim petition, he stated it thus: "While breaking rock with a sledge hammer a piece of rock flew in or struck my left eye causing a cataract which resulted in operation in October, 1919 and which has left my eye useless for work as a miner." The claim petition was sworn to December 22, 1919 and seems to have been filed December 29, 1919. When the hearing was had before the Referee on the 21st. of January, 1920, the

claimant's counsel moved to amend said paragraph five, so as to read as follows: "While breaking rock with sledge hammer piece of rock flew in or struck my left eye causing cataract which aggravated a pre-existing condition to such an extent that an operation upon such eye became necessary which operation was performed in October, 1919, leaving said eye useless for work as a miner." The notes show this: "By Mr. Graham (the referee); Mr. Troutman does not object and the amendment is granted." In its answer to the claim petition, the defendant denied the claimant's statement as set forth in the fifth paragraph and it now makes application to have the amendment of the paragraph stricken out. Since the amendment was made without objection we decline the application.

The uncontradicted evidence shows that, before the accident, Bakunas had senile cataract in both eyes, and that not many days after the accident the vision in the left eye was considerably less than in the right eye. The alleged injury happened near quitting time and Bakunas was sent to Doctor Berkheiser for attention. Doctor Berkheiser after seeing him four or five times sent him to Doctor Halberstadt in Pottsville. Bakunas testified that Doctor Berkheiser told him he could see a plain scratch on the eye. Bakunas continued to work steadily as a miner until the following June when he was discharged for not loading the cars properly. Doctor Halberstadt told him his eye would have to be operated upon when it was ready. He visited Doctor Halberstadt's office until the last part of May and then he went to see Doctor Winter who told him he would have to be operated upon. Doctors Berkheiser and Halberstadt both represented the defendant, whilst Doctor Winter was Bakunas' family physician. Bakunas moved to Philadelphia in July and in October he was operated on as a free patient at the Wills Eye Hospital, and on the 29th. of November, became employed with the Victor Talking Machine Company of Camden, New Jersey. He called no witnesses to corroborate his account of the accident. Doctor

John Colgan examined the claimant on the 13th. of December, 1919, at the request of the claimant's counsel and testified on behalf of Bakunas before the referee, and he said that the operation was removal of a cataract on the left eye and that the right eye was also cataractous. As Doctor Colgan found a cataract on the right eye, he felt it reasonable to suppose that there had been one on the left eye, and he concluded that the injury aggravated the condition of the left eye to such an extent that the cataract was hastened to maturity more quickly than would have occurred under ordinary circumstances. "Cataracts move with the same rapidity when each eye is affected in the same individual," he said. He further testified that "An injury or blow, even without penetration into the lens itself, can cause a cataractous condition, or concussion without the existence of a previous cataract." He could not tell whether there was a traumatic condition excepting by a history which Bakunas gave him.

"Q. If that history was not correct your diagnosis or conclusion based on that history would not be correct? A. I am afraid so." The doctor further testified, "I admitted, if you remember, that I concluded, perfectly willing to assume, that the man did have cataracts in both eyes, but in view of the fact the man gave me a history of an injury I concluded that aggravation caused this cataract to become much more quicker matured. In conjunction or proof I showed that this man's vision in the right eye is practically the same today, or rather it was on December 13, 1919, eleven months after Doctor Halberstadt saw him, as it was when he saw him; the cataract advanced practically nothing. The cataract in the injured eye has advanced to complete maturity over a period of some where between January 13, 1919 and October, 1919, and was taken out." "Q. Then your opinion is all predicated that there was an injury to the man which affected his lens or eye, speaking generally, and formed a cataract. A. I showed that it aggravated the cataract. Q. But you are predicating your

opinion upon the fact that there was an injury." A. Yes." "Q. Assuming an injury, what character of an injury would there have to be to fire up or excite and bring to a conclusion, as you call it, this cataractous condition? A. A blow. Q. Of what character? A. Any character. Q. Would not the eye have to be affected by it? A. No. Our text books show a cataract can be formed or aggravated by concussion. Q. Suppose it should be shown that there was no direct injury or traumatic condition at all, and that there was no blow received, what opinion would you have? A. I think it was a most unusual condition. Q. What would be your opinion of this condition? A. I do not think that I have any. Q. Could you form one under such a state of facts. A. No, I do not see how." He further testified. "Q. From your experience can you say that cataracts will progress pretty nearly normally together? A. Yes, I feel that they do. I do not mean exactly even, one may go ahead of the other, but not for one to go as far as this man's had gone to maturity in eight months and the one in the other eye not move. *****." Q. Are you able to say that this man's condition could not have developed the way it did from natural causes without any aggravation? A. I would be willing to so state. Q. Do I understand you to mean that it would not progress in its natural state? A. Yes." Further, "Q. Doctor, just so this record is clear I understand you to say that your position here today is that in your opinion the accident which the claimant described to you was of such a character that it aggravated a pre-existing cataract condition to maturity at a very rapid and earlier date than it would have gone along in its natural course? A. Yes." Doctor Colgan based his opinion upon the statement of an injury given to him by Bakunas.

Doctor Berkheiser to whom Bakunas went for treatment on the day of the accident testified that Bakunas told him that he was struck on the eye with a piece of coal. The doctor examined his eye. It was open; had no abrasion, no contusion or laceration. There was no visible evidence

of injury to the lids. The conjunctiva was normal. There was no blepharitis; no conjunctivitis, that is inflammation of the mucus membrane. The mucus membrane was normal. The doctor found no objective symptoms or anything penetrating the eye. "No penetrating wound or non-penetrating wound, or superficial wound on the eyeball. All symptoms were subjective. He complained of no pain. No profuse lacrimation; no spasms of the eye lid. Bakunas had complained of failing eye sight. There was no scar or scratch on the eye or eye-ball, nor on the tissues of the eye, and the lids were normal. Doctor Berkheiser denied that he said to Bakunas there was a scratch on the eye. Doctor Berkheiser sent Bakunas to Doctor Halberstadt to have an aphthamoscopic examination made of the eye. Doctor Halberstadt being an eye specialist. Doctor Berkheiser could not discover any signs of injury to the eye, as there was no external evidence of any injury. Doctor Berkheiser's opinion was that Bakunas' failing eye sight was due to natural causes, and that the alleged injury had no connection with it. There was no traumatic condition in his eye. The only possible way to have a traumatic cataract is to have a blow strike with sufficient force to rupture the capsular. If the blow were sufficient the first thing it would have done would have been to lacerate the conjunctiva or eye. Doctor Berkheiser saw Bakunas about nine times and his opinion was, Bakunas had no injury "because in a real injury you always have some objective manifestations of an injury," and the doctor saw none in Bakunas' condition. The doctor would not say the man did not receive a blow but he testified that he could not discover any evidence of a blow. If there had been such a blow there would have been some contusion or congestion of the tissues. Doctor Halberstadt testified that Bakunas came to him on the 26th. of January, 1919, but "he gave positively nothing had struck his eye, that he was blinded for the time being by a flash from breaking a rock with a pick." Neither eye showed any evidence of injury. The vision in the right eye was 5-20 and 5-35 in the left eye.

Bakunas had senile cataracts. When asked whether a cataract in one eye could progress more rapidly than the other, Doctor Halberstadt testified that he never saw two alike. Said that there was absolutely no evidence of force; no traumatic condition present. He examined Bakunas eight days after the accident, and said, "That if the man had had a scratch sufficiently severe on his cornea or eye to produce or aggravate a cataract it would be in evidence eight days later *****. If Doctor Berkheiser saw a scratch on his eye sufficiently deep to cause a cataract there would have been some evidence eight days afterwards, and in all probability some evidence to-day. The cornea was perfectly clear and no evidence of any injury and Mr. Bakunas positively gave him no history of any injury." Doctor Halberstadt further testified; "Q. If the referee should find under this testimony, not only what is offered here to-day, but by any other witnesses that Mr. Bakunas did on January 13, meet with such an accident that he claims while breaking rock a piece flew up and struck him in the eye, would you say to-day as an eye doctor that such an injury could not aggravate a pre-existing condition? A. I certainly would not. Q. Do you want to qualify that statement as to whether it would not aggravate it? A. If he got a very severe blow it might aggravate, you could not tell. Q. Suppose the blow was not severe? A. I could not tell you that."

Doctor Sweet, who is Professor of diseases of the eye at the Philadelphia Polyclinic, clinical professor of diseases of the eye at the Jefferson Hospital and consulting surgeon at the Wills Eye Hospital, examined Bakunas on the 17th of January, 1920, and testified that Bakunas told him a piece of rock struck the left eye and he could not see for a few minutes but continued to work. The cornea showed no scar. The eye had been operated upon for cataract. The progress of cataracts is not uniform. One eye may progress more rapidly and the other will be stationary. One always progresses more rapidly than the other and some remain quiet for years. Doctor Sweet said that the testimony shows

that the cataract is not traumatic and the question of aggravation would depend upon the character of the blow Bakunas received on the eye. If it was a big piece of rock that struck the eye, Doctor Sweet would expect to find upon the eye-ball a scar, and, if it was a small piece, he could not see how it would aggravate a pre-existing condition. There was no scar on the left eye, excepting the key-hole shape scar made by the operation. A mere concussion may aggravate a cataractous condition but usually there is a rupture of the lens capsular. A very heavy blow might aggravate a pre-existing cataractous condition. A small piece might cause a scar on the cornea but it would not injure the eye from concussion.

An exception to findings of fact may allege that such findings are unsupported by competent evidence. Section 427, Act of 1919, P. L., 665.

We have quoted from the testimony enough to show that were this a trial before a jury the evidence would be sufficient to submit the case to the jury. In compensation cases the credibility of the witnesses is for the referee or the Board, and we cannot disturb findings of fact by them or either of them where there is evidence sufficient to sustain the findings. Clearly, there is evidence here to show, if believed, that Bakunas had cataract in both eyes, and that while at work in the course of his employment, he was struck so hard a blow on the left eye by a piece of coal or rock that it accelerated the development of the cataract in that eye and made necessary an operation earlier than would have been the case in the ordinary course of nature. The referee found that the blow injured the claimant's left eye and aggravated the cataract therein so as to accelerate its development and render that eye blind in eight months. And, therefore, under the law the claimant is entitled to compensation. *Clark v. Lehigh Valley Coal Co.*, 264 Pa., 529.

AND NOW, November 1, 1920, Judgment is entered for the sum of \$1250.00 in favor of the claimant and against the defendant.

Borough of McAdoo vs. Dailey

Act of March 31, 1860, P. L. 400 - Act of May 28, 1907, P. L. 262 - Act of May 8, 1919, P. L. 137 - Municipal paving under void ordinance.

The act of March 31, 1860, P. L. 400 makes it unlawful for any manager or agent of a municipality to be interested in any municipal contract.

The act of May 28, 1907, P. L. 262 prohibits borough officers, agents and employes from being interested in any contract for the sale or furnishing supplies to the borough and provides for forfeiture of office or appointment.

The act of May 8, 1919, P. L. 137 validates defective ordinances for paving.

Motion in arrest of judgment. No. 270, September Term, 1919.

R. A. Freiler, for motion.

A. L. Shay, contra.

KOCH, J. November 8, 1920.

This suit is brought to recover part of the cost of grading and macadamizing Tamaqua Street, where the same abuts the property of the defendant in the borough of McAdoo. The defendant resists payment because the work was done by one C. H. Moore, the borough engineer, under a contract made by and between himself and the borough. The evidence shows that the council of said borough in January, 1914, elected said Moore as borough engineer for a term of two years, and that he was again elected in January, 1916, for another term of two years. The contract under which he did the work is dated November 4, 1915. The contract states that Moore submitted his bid on the 5th. of August, 1915, after the borough had duly advertised for bids and that the contract was awarded to him on the same day that his bid was submitted. The evidence shows that the borough ordinance authorizing the work to be done was not enacted and approved until the 24th. day of August, 1915. The third section of the ordinance provides, "That

specifications be drawn specifying the material to be used and the manner of using it in conformity with section one of this ordinance, and upon completion of said specifications the secretary of council is hereby directed to advertise for bids to be opened by council when council may award the contract to the lowest and best bidder," etc. These specifications for the work were prepared by the said C. H. Moore in his capacity as borough engineer and were approved and adopted by the town council on the 24th. day of August, 1915. In the specifications, we find that "The work will be done under the supervision and inspection of the borough engineer and any changes ordered by him, not increasing the number of square yards, shall be done without extra charge." The specifications provide for inspection of the work by the borough engineer and they, inter alia, say "The engineer has the power to stop the work at any time the plans and specifications are not complied with." We quote further from the specifications, as follows:- "All explanations and directions necessary to the completion of the work will be given by the engineer." "In case of wet or spongy places encountered while excavating, the contractor will go to a depth required of him by the engineer and re-fill as directed." "The road-way will be constructed in accordance with these specifications and the attached plans which are made a part of the contract." "The engineer will furnish all grades and measurements which in his opinion are necessary." "All waste material and material wanted by council must be removed to such place within the borough limits as the engineer directs." "The proposal for macadamizing is to be made at the rate per square yard, which includes all necessary grading, materials, supplies, labor, work and expenses contingent with the work to complete the street in a satisfactory manner to the borough authorities and the engineer. After the sub-grading has been accepted by the engineer, a layer of broken stone that will pass through a three inch ring known as No. 1 stone shall be spread, which shall then be rolled until even. A filler of gravel or broken

chips of sufficient quantity to fill the voids and depressions shall then be spread and the rolling continued until the entire course is thoroughly consolidated and conforms with the cross sections shown on the plans." "The return of the engineer will be the account by which the amount of work done and the material furnished shall be computed, and the certificate of said engineer shall be a condition precedent of the right of the contractor before payment of work completed. Payment will be made by the borough upon estimates furnished monthly by the engineer of the amount of work satisfactorily done, less 10 per cent to be retained until the completion and acceptance of said work by the borough of McAdoo."

From the foregoing it is made to appear that when the work was in contemplation bids were advertised for and that the engineer himself bid and was awarded the contract and that he later made his own specifications for the work he was to do. By the provisions of the specifications the engineer made himself the undisputed supervisor of the work under his own contract and it appears that he exercised such powers of supervision. The street commissioner of the borough who seems to have tried to boss the job testified that the contractor fought with him; that the work was never well done, and that he was not satisfied; that the engineer was the engineer and contractor and told him he had nothing to do with it.

Such a contract as we here find cannot be countenanced under the law. In fact, it is not a contract, for it became void ab initio. The statute law of this state expressly forbids the making of such a contract. By the terms of the specifications the engineer was made the manager of the work. The 66th. section of an act entitled "An Act to consolidate, revise and amend the penal laws of this Commonwealth," approved the 31st. day of March, 1860, P. L., 400, expressly makes it unlawful for any manager or agent of a municipality to "be in any wise interested in any contract for the sale or furnishing of any supplies or materials to

be furnished to, or for the use of, any corporation, municipality or public institution, of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein." Any person violating these provisions is guilty of a misdemeanor. The contract in this case is expressly forbidden by an act entitled "An Act relating to borough officers, employes, and contracts, and providing for the punishment of any violation of its provisions," approved the 28th. day of May, 1907, P. L., 262, which provides, "That it shall not be lawful for any burgess or member of council of any borough, or any officer, agent or employe thereof, to be in any way interested, either directly or indirectly, in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of such borough, or to receive any reward or gratuity from any person interested in such contract or sale; nor shall any such burgess, member of council, officer, agent, or employe of any borough be a member of any partnership, or a stock holder or officer of any corporation, or any agent or employe of any individual, partnership, or corporation, in any way interested in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of, or any work to be done for, such borough; and any person violating these provisions, or any of them, shall forfeit his office or appointment in such borough, and also shall be guilty of a misdemeanor, and upon conviction thereof be sentenced to pay a fine not exceeding five hundred dollars."

Our late Chief Justice Paxson said, in *Milford Borough v. Milford Water Company*, 124 Pa., 623, "It is almost needless to say that a contract so prohibited by law is utterly void, and there is no power that can breathe life into such a dead thing." And further, "The act of 1860 is another of the valuable safe-guards thrown around municipalities. It was passed to protect the people from the frauds of their own servants and agents. It may be there was no fraud, actual or intended, in the present case, but we will not allow it to be an entering wedge to destroy the act of 1860."

A school treasurer was sur-charged for paying vouchers for coal and wood supplied by members of the school board in violation of the act of 31st. March, 1860, P. L., 382: *Wolford v. School District*, 46 Superior Court, page 1. "Contracts which are forbidden by statute are inconsistent with public policy and are absolutely void:" *Lyon v. Phillips*, 106 Pa., 57. Under the provisions of the act of 1907, above quoted, we were obliged to remove from office the Chief Burgess of Tamaqua, because he was employed in a printing establishment which furnished supplies to the borough: *Commonwealth v. Harris*, 248 Pa., 570.

It is quite clear that there was no legal contract between the borough and its engineer for the paving of Tamaqua Street and it is equally clear to say that the borough cannot now take advantage of its own wrong to compel the defendant to pay for work done and material furnished under a void contract," where an act or contract is prohibited under a penalty, it is illegal and void, though the statute does not expressly so declare." *Burkholder v. Beetam's administrator*, 65 Pa., 496. Justice Williams said, in *Pittsburgh v. Cluley*, 74 Pa., 262, "There is a plain distinction between an act done without authority and an act erroneously done under authority. In the one case it is void for want of authority; in the other it is voidable for its improper exercise, but not absolutely void." As the contract under which the work was done was void, the borough may not file a municipal lien for the work so done, for an action founded upon a transaction prohibited by statute, cannot be maintained: *Seidenbender v. Charles' administrator*, 4 S. & R., 151. "An action founded upon a violation of the laws of the United States, or of this state, cannot be maintained in the courts of this state; *Mabin v. Coulon*, 4 Dall. 298; s. c. 4 Yeates, 24." *Holt v. Green*, 73 Pa. 200. "The test whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the aid of an illegal transaction to establish his case, *Swan v. Scott*, 11 S. & R., 164; *Thomas v. Brady*,

10 Barr, 170; *Scott v. Duffy*, 2 Harris, 20. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him; *Thomas v. Brady*, *supra*. It has been well said that an objection may often sound very ill in the mouth of a defendant, but is not for his sake the objection is allowed. It is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act; *Mitchell v. Smith*, 1 Binn. 118; *Seidenbender v. Charles' administrator*, *supra*. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation; *Coppell v. Hall*, 7 Wallace, 558" "*Holt v. Green*, 73 Pa., 200.

A municipality can create a valid municipal lien for improving a street only when the improvement is made in pursuance of law: *Western Pennsylvania Railway Company v. City of Allegheny*, 92 Pa., 100; *Fell v. Philadelphia*, 81 Pa., 75.

But the plaintiff argues that the municipal lien, which in this case was filed on the 6th. of March, 1917, is made valid by the provisions of an act approved the 8th. day of May, 1919, P. L., 137. The act is as follows:

"That whenever in any borough in this Commonwealth, prior to the passage of this act, a highway, or part thereof, has been improved by being paved or paved and curbed, with brick or other paving and curbing material, in the pursuance of authority of an Act of Assembly and an ordinance passed and enacted in pursuance thereof, and the costs and expenses or part part thereof, of the improvements assessed on the abutting property owners as provided by the ordinance and act of Assembly authorizing and directing such improvement, and a municipal lien has been filed against the property owner thereof, but, owing to some defect in the ordinance, assessment, or for any other reason, the proceeding by the council authorizing and directing the improve-

ment, or any municipal lien filed therefor, is defective or invalid, such proceeding, authorizing the improvement, and any municipal lien filed therefor, are hereby validated and made binding for the amount justly and equitably due and payable on account of such paving and curbing; Provided, That this act shall not apply to any proceeding, suit or lien wherein a final order or judgment of any court of record has already been made or entered."

That the legislature may pass acts making valid that which was theretofore invalid is beyond question. This is amply shown by the following quotations from the opinion of Mr. Justice Elkin in *Swartz v. Carlisle Borough*, 237 Pa., 483: "It has been decided over and over again that the legislature may by subsequent act, validate and confirm previous acts of a municipal corporation, which would otherwise be invalid. It is settled law in Pennsylvania that the legislature has the power to legislate retrospectively on all matters, not penal, nor in violation of contracts, not expressly forbidden by the Constitution: *Weister v. Hade*, 52 Pa., 474; *Grim v. School District*, 57 Pa., 433; *Hawkins v. Com.*, 76 Pa., 15. * * * * * Defective acknowledgements have been frequently validated by subsequent legislation. *Tate v. Stooltzfoos*, 16 S. & R., 35; *Journey v. Gibson*, 56 Pa. 57. Municipal assessments, uncollectible by reason of defects in the proceedings, have been cured by subsequent retroactive acts: *Com. v. Marshall*, 69 Pa. 328; *Donley v. Pittsburgh*, 147 Pa., 548. Defects in tax levies have been cured in the same way: *Weister v. Hade*, 52 Pa., 474; *Hewitt's App.*, 88 Pa., 55 * * * * * Our reports are full of cases to the same general effect. The true rule seems to be, as we gather it from our own cases, and from decisions in other jurisdictions, and from text writers generally, that where the omission to be cured is some act which the legislature might have dispensed with by a prior statute, the courts will construe the curative act so as to give it the retrospective operation intended. * * * * * The same rule is recognized and followed in many other jurisdictions.

Acts validating defective elections and legalizing municipal bond issues have been frequently held to be constitutional: *Springfield Safe Deposit & Trust Company v. Attica*, 85 Fed. Reps., 387; *State v. Brown*, 106 N. W. Repr., 477; *Witter v. Polk County*, 112 Iowa, 380; *Schneck v. Jeffersonville*, 152 Ind., 204; *Read v. Plattsmouth*, 107 U. S., 568; *Bolles v. Brimfield*, 120 U. S., 759."

The language of the act of 1919, P. L., 137 is very broad, but, in the case before us, the contract was not made "in pursuance of authority of an act of assembly and an ordinance passed and enacted in pursuance thereof" so far, at least, as concerns the parties to the contract. In that respect, it was made without and directly contrary to and against such authority. The making of the contract was in direct violation of the two acts of Assembly hereinabove referred to, to wit, those of 1860 and 1907. The contract was, therefore, not made in pursuance of any legislative authority and on that account we think we acted correctly by directing a verdict for the defendant on the defendant's motion, after all the testimony had been heard and the case had been closed.

AND NOW NOVEMBER 8, 1920, the motion in arrest of judgment and for judgment non obstante veredicto is overruled, and the Prothonotary is directed to enter judgment in favor of the defendant, upon payment of the jury fee.

In re Appeal of Albert Thompson

Assessments - Assessor's oath - Act of July 27, 1842, P. L. 445 - Powers of assessors - Market value - Appeals - Act of April 19, 1889, P. L. 37 - Acts of April 3, 1804, Sec. 1, 4 Sm. L. 201 and March 28, 1806, Sec. 1, 4 Sm. L. 346 - Duty of the court on appeal - Burden of proof.

The law governing assessments of land for the purposes of taxation is statutory and neither the assessor, county commissioners, board of revision nor the courts, have authority to proceed in any other manner than as prescribed by the statutes.

The act of July 27, 1842, P. L. 445 prescribes the assessor's oath.

The assessor actually makes the assessment which continues until modified on appeal.

The assessor may not divide a tract of land in several parts but must value each tract as a whole.

All real estate should be assessed at its actual market value, at a uniform standard of value throughout the county.

The actual market value of land means that price at which it would sell, to a bona fide bidder, at a public sale, after full public notice. The act of April 19, 1889, P. L. 37 does not authorize one appeal for all the lands in one township, but a separate appeal must be filed for each assessment whereby one is aggrieved.

The acts of April 3, 1804, Sec. 1 4 Sm. L. 201 and March 28, 1906, Sec. 1. 4 Sm. L. 346 require the holders of unseated lands to furnish the county commissioners a statement containing a description of each and every tract so held, the name of the persons to whom the original title from the commonwealth passed, the nature, number and date of such original title.

If a tract of unseated land is divided by township lines each part thereof should be valued and assessed upon the acreage in the respective townships.

When the market value of land has been ascertained it becomes the duty of the court, on appeal, to fix the market value so that the ratio between its market and assessed value shall be the same as the ratio existing between the market and assessed values of all the real estate throughout the county.

When the appellee offers in evidence the assessment made by the board of revision and rests, a prima facie case is made out in favor of the assessment and the burden is upon the appellant to overcome it by the weight of evidence; if not overcome and it is not shown that the county commissioners, sitting as a board of revision, acted arbitrarily, or without sufficient reliable information and evidence in making the assessment, it will not be reduced by the court.

Appeals from Tax Assessments. Nos. 388 - 394, May Term, 1919.

G. M. Roads and W. C. Devitt, for appellant.

A. L. Shay and C. A. Snyder, for appellees.

KOCH, J.

Albert Thompson, the appellant, is a resident of the state of New Hampshire and is the owner of certain lands situate in this county. The lands form one contiguous tract and lie in the townships of Butler, Cass, New Castle, West Mahanoy, Ryon and Blythe. Their aggregate area is 10,283 acres of which 5,969 are barren and the remaining 4,314 acres are said to be coal bearing lands. Being dissatisfied with the assessments made by the assessors in the respective townships, Thompson appealed to the county commissioners as a board of revision, and, not being content with their valuations, the matter is, by virtue of his appeals, now before us for our consideration de novo, there being a separate appeal for each township. The said appeals are entered as follows, to wit; To No. 388 May Term, 1919 from the assessment of the land in West Mahanoy Township; to No. 390 May Term, 1919, from the assessment of the land in Butler Township; to No. 391 May Term, 1919, from the assessment of the land in Blythe township; to No. 392 May Term, 1919 from the assessment of the land in Cass Township; to No. 393 May Term, 1919, from the assessment of the land in Ryon Township, and to No. 394 May Term, 1919 from the assessment of the land in New Castle Township. These appeals were all heard together. Although these appeals must be separately considered for the purpose of making a separate and appropriate decree in each case, it will be necessary to consider their general aspects in only one case, as most of the facts and the same principles of law apply to all these cases.

Our court is composed of three judges and all of us sat during the hearings of these appeals, although but a single judge might have sat in the capacity of a chancellor to find the facts and conclusions of law alone: Lehigh and

Wilkes Barre Coal Company's assessment, 225 Pa., 272; Lehigh Valley Coal Company v. Commissioners, 250 Pa., 515, and New York etc. Coal Company v. Commissioners, 250 Pa., 526. But it has fallen to me to state the findings of fact and conclusions of law, to which the parties in interest may file exceptions which, if any, will thereafter be heard and disposed of by the court sitting in banc.

From the evidence, I find the following

F A C T S

1. In said township of West Mahanoy, the assessments of land owned by the said Albert Thompson, are as follows:- 67 acres of barren land assessed at \$12 per acre, total valuation \$804.00, name of warrantee, Peter Yoh; 185 acres of coal land assessed at \$775 per acre, total valuation \$143,375, name of warrantee, Christian Keisler and 110 acres of barren land assessed at \$12 per acre, total valuation \$1320, with same warrantee, namely, Christian Keisler. Both of the Christian Keisler tracts are included in the same survey and are parts of the same original tract of land. There is no evidence to show a division of the tract at any time otherwise than, perhaps, for the purpose of making assessments. Also 23 acres of coal land assessed at \$775 per acre, total valuation, \$17,825, name of warrantee, Charles Cherry and 29 acres of barren land assessed at \$12 per acre, total \$348 in name of same warrantee, to wit, Charles Cherry. Both of these tracts are included in the same survey and are parts of the same original tract of land. All these lands are assessed as unseated.

2. There are also assessed against the said Albert Thompson in said township of West Mahanoy as seated property, a one-half story frame office at \$115; four two story blocks at \$916; and one possession house at \$229. These are assessed as Crystal Run Colliery.

3. No evidence was offered to support the appeal in this case so far as it concerns the seated property mentioned in the above finding numbered 2.

4. The lands referred to in finding number 1 are part

of what are commonly known as the Broad Mountain Lands, which consist of 10,283 acres composed of many original tracts and now constituting one tract situate in said townships of Butler, Cass, New Castle, West Mahanoy, Ryon and Blythe.

5. Albert Thompson purchased the said land as one body in January, 1906 and paid \$320,000 for the same.

6. The said Broad Mountain Lands contain three or four coal basins each of which is said to contain certain veins of coal.

7. Since Mr. Thompson acquired the land he has sold in fee about fifty acres thereof to the Frackville Realty Company for \$50,000. This land adjoins the borough of Frackville and was sub-divided into building lots and is known as the Womelsdorf Addition to the borough of Frackville. Mr. Thompson has also sold two or three reservoir sites, and testified that he has offered all these Broad Mountain Lands for sale at \$500,000 and that he will take \$400,000 for all of the said land at any time.

8. As mining propositions said Broad Mountain Lands have hitherto been very little of a success.

9. Some years ago a colliery known as the Crystal Run Colliery was established on the land in West Mahanoy township but it was abandoned after about 180,000 tons of coal had been mined.

10. In the last fifty-two or fifty-three years at least four attempts to discover enough coal to warrant the expenditure of money necessary to mine coal in paying quantities have been made on different parts of the said Broad Mountain Lands and in each instance the project was abandoned because of faults or insufficient marketable coal.

11. The coal veins that do exist on said land, so far as they have been tested up to the present time, show a lack of continuity in thickness and are not of a quality to warrant the expenditure for the erection of collieries.

12. The lands are part of a plateau on the top of the Broad Mountain and are about 1600 feet above sea level.

13. On the valuation of lands for the purpose of taxation the county commissioners allowed a reduction of twenty-five per cent of what they considered the marketable value.

14. During the hearing it was held by a majority of the court that all the lands of the appellant lying contiguous to each other in any one township must be assessed together as a whole and that they should not be assessed in tracts as indicated by the warrantees and as originally assessed in this case. Therefore, testimony was taken only as to the valuation of all of the appellant's lands in each separate township.

15. The evidence in the case as to the market value of the land belonging to the appellant in the township of West Mahanoy, taken altogether and constituting 414 acres of coal bearing and barren land, varies in the opinion of different witnesses from \$4140 to \$44,072. Between these two figures one witness fixes the value at \$20,700 and two other witnesses at \$43,966.30.

16. The county commissioners called a mining engineer as a witness who estimated the value of all these lands by assuming a certain coal area for each supposed basin on the land, and then further assuming the thickness of each vein of coal and therefrom calculating the quantity of marketable coal and giving to it a value of eight cents per ton in place and by giving to all barren land a separate value per acre. But he also testified that he based his valuation partly on a map which appellant put in evidence, partly on personal observations, partly on reading the reports of other engineers, partly on geological reports, and on information derived from practical miners, and that he based his valuation also on sales that have been made around here, and compared that with the approximations of the amount of coal that he thought possibly might be in the property, and also the location.

17. It was agreed that a certain other mining engineer if called by the county commissioners would testify to the

same effect, and, therefore, the case is to be disposed of with like effect as if the said other engineer had fully testified.

18. According to the testimony of the said two engineers the value of the 414 acres of appellant's land in said West Mahanoy Township is \$106.20 per acre.

19. The reliance of the commissioners' engineer upon an assumption of the existence, thickness, quality, area and feasibility of the coal basins for mining purposes on the said Broad Mountain Lands is not warranted by numerous tests actually made upon the lands, and said assumption is an unsafe and an unreliable factor for the estimation of the rate or price at which the land would bona fide sell after full public notice.

20. The opinion of the commissioners' engineer as to the valuation is evidently based almost entirely upon his estimate of the quality of coal in the respective townships and the bases of his estimate are not sufficiently well established to be considered reliable.

21. Careful consideration of the testimony of the commissioners' engineer compels the inference that his aggregate valuation of all these Broad Mountain Lands at over one and a half million dollars is based almost entirely upon his estimate of the quantity of coal in place, and that that estimate is too largely based on suppositions only.

22. The valuation of all the said Broad Mountain Lands by the county commissioners' engineer aggregate \$1,502,599.99; by the county commissioners themselves \$770,083, and by the highest one of the appellant's witnesses \$382,694.

23. As the owner paid only \$320,000 for all this land in 1906 and is now willing to sell them for \$400,000, I believe the valuation put upon the parcels in the various townships by John R. Hoffman, whose figures aggregate the sum of \$382,694 in all the townships is fair and is the price at which the land would bona fide sell at public sale after full public notice.

24. The record does not clearly show how the county commissioners arrived at the valuation which they gave to the land in question, but the presumption of the correctness of their conclusion is clearly overcome by all the evidence in the case, and I find that all of the appellant's land in West Mahanoy Township, taken together as forming one tract, is of the actual value of \$44,072.

25. The owner of this land had been assessed in tracts according to the names of the respective warrantees, but, as already indicated, the tracts lie contiguous to each other and form a parcel of said Broad Mountain Lands in said township of West Mahanoy. .

26. My additional findings of fact will appear by my answers to the separate requests of the respective parties for findings of fact.

27. The testimony in this and in the other five appeals referred to was taken as if in relation to No. 394 May Term, 1919, and is filed under and to that number and term, but it relates to and governs all of said six appeals.

CONCLUSIONS OF LAW

1. The law governing assessments of land for the purpose of taxation is statutory and neither the assessor, county commissioners, board of revision nor the courts, on appeal, have authority to proceed in any other manner than as prescribed by the statutes. *Philadelphia and Reading Coal and Iron Company v. County Commissioners*, 229 Pa., 461.

2. The assessor's oath as prescribed by the Act of July 27, 1842, P. L., 445, provides, "That you will justly and honestly to the best of your judgment assess and value every separate lot or piece or tract of land with the improvements thereon ***** at a rate or price which you shall, after due examination and consideration, believe the same would sell for, if sold singly and separately at a bona fide sale after full public notice." This oath makes the assessor's duty entirely clear and we are obliged to note that duty in the performance of our duty.

3. The assessor actually makes the assessment and valuation and his assessment and valuation so continues until modified on appeal. The court makes no assessment; if anything, it only changes the figures of the valuation and corrects other errors in the assessment.

4. In making an assessment, an assessor, where the land belongs to a single owner, may not divide a tract of land into several parts and value each separately as was done in this case. The assessor fell into error in separately putting a valuation on 185 acres of coal land and on 110 acres of barren land in the Christian Keisler tract. He should have valued and assessed the Christian Keisler tract as a whole, and he should have assessed the Charles Cherry tract in like manner instead of dividing it into coal land and barren land.

5. All real estate should be assessed and valued at its actual market value, but it must be assessed at a uniform standard of value throughout the county, even if that value be below the market value. *Lehigh and Wilkes Barre Coal Company v. Luzerne County*, 225 Pa., 267; *Delaware, Lackawanna and Western Railroad Company Tax Assessment*, No. 1, 224 Pa., 240; *Rockhill Coal and Iron Company v. Fulton County*, 204 Pa., 44.

6. The foot acre basis of ascertaining assessable value which was adopted by the commissioners' engineer is exceptional and not of general application and when applied to coal lands, the local conditions must be such as to give the whole coal area a present market value which must be ascertained upon some definite fixed basis. *Lehigh and Wilkes Barre Coal Company's assessment*, 225 Pa., 272.

7. The actual market value of each parcel of this land situate in the respective townships, is the only true basis for its assessment, but the principle of uniformity throughout the county must nevertheless control.

8. The actual market value of land means that price at which a piece of land will sell to a bona fide bidder at a public sale after full public notice; and by full public notice

I mean such notice as is likely to bring timely knowledge of the sale home to parties who may bona fide enter into competitive bidding for the property when offered at public sale.

9. In accordance with the legal principle stated in the last above conclusion of law and the 13th. finding of fact, the true valuation of the appellant's land for the purpose of taxation in West Mahanoy Township should be stated at three-fourths of its actual valuation as stated in the 24th. finding of fact, that is to say at three-fourths of \$44,072, or \$33,054.

10. As no evidence was offered in support of the appeal so far as it relates to seated property, the assessment of the seated property is sustained.

11. My additional conclusions of law will appear by my answers to the separate requests of the respective parties for findings of conclusions of law.

D E C R E E

ANW NOW SEPTEMBER 13th, 1920, it is decreed nisi that for the purpose of taxation the valuation of the appellant's 414 acres of land in West Mahanoy Township is \$33,054, and that the county shall pay the costs of this appeal, this decree to become final unless exceptions be filed thereto within three weeks from this date.

Desertion - Recognizance for compliance with order for support.

Motion for Execution. No. 192, May Term, 1920.

M. J. Ryan, contra.

Mary Stauffenburg prosecuted her husband for desertion and non-support, and, on the 1st of June, 1914, our court of quarter sessions of the peace ordered John Stauffenburg to pay to his wife monthly the sum of fifteen (\$15.00) dollars and to give security in the sum of three hundred (\$300.00) dollars for his compliance with said order. The case was entered in the office of the Clerk of Quarter Sessions to No. 722 May Sessions, 1914. The recognizance was taken on June 2, 1914, and is as follows:

"We and each of us do acknowledge ourselves, jointly and severally, indebted to the Commonwealth of Pennsylvania in the sum of \$300.00 to be levied on our and each of our goods and chattels, lands and tenements; upon this condition, that if John Stauffenburg, the defendant in the above case, shall pay to Mary Stauffenburg, the prosecutrix, the sum of fifteen (\$15.00) dollars per month for the support of herself until otherwise ordered by the court, then this recognizance to be void and of no effect, otherwise to be and remain in full force and virtue.

Witness: John Stauffenburg (SEAL)
John M. Adam (SEAL)

Taken and acknowledged before me in open court this

2nd. day of June A. D., 1914.

James McElhenny,
Clerk Sessions."

After making some payments Stauffenburg defaulted and the recognizance was certified into this court on the 20th. day of September, 1917. A writ of scire facias was issued thereon and, in due course, judgment was entered for the full amount of the recognizance. John M. Adam, Stauffenburg's surety, thereupon paid what was then due Mrs. Stauffenburg, to wit, \$285.00. As Stauffenburg further failed to heed the court's order, a suggestion was entered of record alleging his default in the sum of \$135.00, covering the period from the first of September, 1917 to the first of June, 1918, but as John M. Adam had died on the 8th. of April, 1918, a writ of scire facias was issued and served upon the executors of his last will and testament to No. 114 July Term, 1918, commanding them to show cause why execution should not be had for said sum of \$135.00 and costs. After hearing had, execution for said sum was allowed to issue. See Commonwealth v. Stauffenburg, 15 Schuylkill Legal Record, 23. And the said \$135.00, together with all costs, was paid by the said executors. There was thus paid by Adam and his executors the total sum of \$420.00 or \$120.00 more than the amount stated in the recognizance. Subsequently to paying said \$135.00, the executors obtained a rule on the commonwealth to show cause why the surety should not be discharged from further liability, and, after hearing had, the rule was made absolute on the first of June, 1920. See No. 722 May Sessions, 1914.

Now we are confronted with a motion to direct execution to issue against said executors to collect \$180.00 more to cover Stauffenburg's default during a period of twelve months prior to the first of June, 1920. If the executors are compelled to pay that amount, there will have been paid twice as much as the sum stated in the recognizance.

Can the estate of the surety be compelled to pay more than the penalty of three hundred dollars which is men-

tioned in the recognizance?

This court has held hitherto in a number of cases that such a recognizance as we here find is in the nature of a continuing security for the discharge of a constantly recurring liability, and that the surety is not relieved from his obligation even though he has paid the full amount stated in the recognizance. Two such cases decided by this court have been reported. See *Commonwealth v. Fox*, 6 Schuylkill Legal Record, 15 and *Commonwealth v. Stauffenberg*, 15 Schuylkill Legal Record 23. But the circumstances of this case now cause us to hesitate and to ask ourselves whether the previous decisions of this court are sound and correct in principle. I incline to the view that they are not and that we should no longer follow them as precedents. "It is far better when this court commits a blunder to correct it in a manly way than to imitate the ostrich by hiding our heads in the sand," said that writer of vigorous opinions, Mr. Justice Paxson in *Yorks's Appeal*, 110 Pa., 69, 78. Fundamentally, the case of *Vogel v. Hughes*, 2 Miles, 380 influenced this court in arriving at the conclusions stated in the *Fox* and *Stauffenberg* cases, *supra*. But we misinterpreted the case.

In the case of *Vogel v. Hughes*, 2 Miles, 380, the recognizance was for \$1000 and contained a power of attorney empowering any attorney of any court of record to appear for him, and, after declaration filed for the above sum, "thereupon to confess judgment or judgments against me as of any time or term before or after the date hereof, and thereupon to issue execution for such sum or sums as shall, by affidavit filed in the said court, appear to be due by breach of the condition of this obligation, together with costs of suit; and the said judgment or judgments shall afterwards remain as security for the performance of the said condition, and, in case of any further breach of the said condition, execution shall issue thereupon in the same manner as before." The recognizance was given in a desertion and non-support case, in which Hughes was sentenced to

pay the sum of ten dollars per week. Subsequently to entry of judgment on the said recognizance, Hughes gave Vogel a mortgage which afterwards was foreclosed, and the proceeds of sale were paid into court. At the time of the foreclosure Hughes had paid a total of \$511.00 in weekly instalments for the support of his wife and children, and Vogel claimed that he should receive \$511 out of the proceeds of the sale. His rule to effectuate that purpose was discharged, the court saying, "The bond on which the judgment was entered in favor of the guardian is in the nature of a continuing security for the discharge of a constantly accruing liability. It stands for all and every part of the liability contemplated. Execution may issue on the judgment for any sum which may become due by breach of the condition and the judgment is afterwards to remain as a security for the performance of the condition. It is not the ordinary case of a bond in a penalty conditioned for the performance of some act simply, in which there is no stipulation as to the continuance of a security, after the condition has been partly performed. In such a case a part payment goes in part discharge of the penalty. This bond, by its terms, is of a different nature, and we cannot diminish the security which the parties intended should remain." It will be noted that there the bond specifically stipulated that "the said judgment or judgments shall afterwards remain as security for the performance of said condition, and, in case of any further breach of said condition, execution shall issue thereupon in the same manner as before," whilst in the case before us, "There is no stipulation as to the continuance of the security after the condition has been partly performed." The court further said, "***** We cannot diminish the security which the parties intended should remain."

In *Silverthorn, et al, v. Hollister, et al*, 87 Pa., 431, the County of Erie required a bond in the sum of \$500 to indemnify the county for the expense of keeping Martha Hollister, an insane person, at the hospital for the insane.

C. C. Hollister, et al gave such bond with warrant of attorney to confess judgment to the county commissioners, conditioned as follows: "Whereas, the expense of keeping Martha Hollister at the Western Pennsylvania Hospital for the Insane, at Dixmont, is charged to and paid by the county.

"Now the condition of the foregoing obligation is such that if the aforementioned C. C. Hollister shall well and truly pay or cause to be paid unto the county treasurer, quarterly in advance, to wit: on the first days of January, April, July and October in each year the sum of thirty-nine dollars, or such other sum, be the same more or less, as the county shall be required to pay for the support and maintenance of the said Martha Hollister at said institution for the ensuing quarter, and shall fully pay and indemnify the said county for any and all expenses incurred by said county by the keeping of the said Martha Hollister at said institution from and after the 22nd day of November, A. D., 1872, then in that case the foregoing obligation to be null and void; otherwise to be and remain in full force and virtue." Judgment was entered on the bond, and the real estate of S. A. Hollister, one of the defendants in the judgment was sold at sheriff's sale for \$1000 on the first of November, 1875, a sum sufficient to cover said judgment of \$500.00, and also a prior judgment of \$300.00. At the time of the sale there was due to the county of Erie for Mrs. Hollister's maintenance the sum of \$140.55. Five hundred dollars of the proceeds of sale were impounded and remained in court as security for the performance of the condition of the bond. On the 29th. of May, 1877, W. C. Goodrich, a lien creditor of S. A. Hollister, whose judgment was entered subsequently to the entering of judgment on said bond, made a motion for a rule to show cause why the \$500 remaining in court should not be released from the lien of the judgment on the payment of \$95.83. The rule was granted and, after argument, was made absolute on the payment to the county of the sum of \$140.55 which was the amount due the county at the date of the sale of the real estate of S. A. Hollister,

viz: November 1st, 1875 and the county commissioners appealed. Mr. Justice Paxson in delivering the opinion of the Supreme Court said, "It is clear that this judgment was a continuing security; it was in the nature of a fixed lien: *Luce v. Snively*, 4 Watts, 397; *Moore v. Shultz*, 1 Harris, 102; *Rutty's Appeal*, 3 Norris, 61, and would not have been discharged by the sheriff's sale but for the fact of there being a prior judgment. It is a mistake to suppose that payments made in accordance with the condition of the bond were payments on account of the penalty. That remains as a continuing security, and until the non-payment of the quarterly or other sum for the support of the lunatic as required by the county of Erie, there is no breach of the condition. After breach the obligors can discharge themselves only by the payment of the penalty," and the judgment of the court below was reversed.

I interpret the last three sentences quoted from the *Hollister* case to mean that the judgment obtained upon the recognizance in that case was a continuing security until there was a breach of the condition of the bond by the failure of C. C. Hollister to pay quarterly the sum of \$39.00 or such other sum as became due, and that upon such breach the sureties in the bond became obliged to pay and could only discharge themselves by payment from time to time until the entire penalty was paid, and that upon payment of the entire penalty the sureties would be discharged from further liability.

Another case relied upon by the commonwealth to support its position that the judgment in this case is a continuing security is that of *New Holland Turnpike Company v. Lancaster County*, 71, Pa., 442. There the company agreed with the county "to pay a one-third part of all reasonable and proper costs of a bridge across Conestoga Creek," and it executed a bond in the sum of \$4000 to the County Commissioners of Lancaster County, conditioned that if the company "shall and will truly pay or cause to be paid a one-third part of all proper and reasonable expenses incurred in

the building or erection of said bridge," then the obligation to be void, etc. The bridge cost \$16,500 and the company offered to pay only \$4000. An action of covenant was then begun against the company and the bond was offered as evidence of the covenant on the part of the company to pay one-third of all proper and reasonable expenses incurred in the building of the bridge, and judgment was entered against the company for the sum of \$5500 with interest. The Supreme Court said, at page 445, "It is to be observed that this is not an action of debt to recover the penalty, but of covenant on the agreement of which the bond is evidence. It is not a mere bond in a penalty - on a condition to be void upon the doing or not doing a collateral act either by the obligor or a third party. Such is the usual case in official bonds with sureties, conditioned for the faithful performance of the duties of some office, or for accounting for money, or an ordinary private bond of indemnity by sureties. In such cases it may be conceded that the penalty of the bond is the limit of liability on the instrument itself: *United States v. Arnold*, 1 Gall. 358; s. c. 9 Cranch 104." Also, "The weight of authority is very preponderating that upon such a bond with a penalty, covenant will lie to recover damages, and that whenever such is the case the amount of damages recovered may exceed the penalty. In *Lowe v. Peers*, 4 Burr. 228, Lord Mansfield said, "There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty and recover the penalty (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction of the whole), or if he does not choose to go for the penalty, he may proceed upon the covenant and recover more or less than the penalty, toties quoties.' This is at law, and he adds what it is material to remember, that equity always relieves against a penalty upon compensation." The case before us is on the bond, and is necessarily in the name of the commonwealth to the use of the deserted wife.

The judgment had to be entered for the full penalty of \$300. *Kiehl v. Commonwealth*, 18 W. N. C. 505; *Duffy et al, v. Lytle*, 5 Watts 120; *Adams v. Rush*, 5 Watts, 289; *Commonwealth v. Seiders*, 1 D. R. 264; *Commonwealth v. DeBurt*, 7 Superior Court, 230.

In *Foster v. Passerieux*, 37 Superior Court, 307, *Passerieux* and his wife agreed to live separate and apart from each other. He gave her a bond with surety conditioned to pay her, or her trustee or any one appointed by her, the sum of \$30 on the signing of the bond "and the sum of \$10 on the first day of each and every calendar month thereafter," during her life time. August Valentour became surety. Judgment was entered for the penal sum of the bond and an attorney's commission of 5 per cent, total being \$525. After Valentour had paid sums defaulted amounting to \$525, it was contended that he was obliged to pay the monthly instalments as long as Mrs. *Passerieux* lives. The Superior Court said, "The defendant, Valentour, the appellee, had entered into no contract which required him to make the monthly payments to the wife of *Passerieux*; the recital of the agreement between the parties in the bond contains no suggestion of any such engagement on his part, nor was any action or payment by him required to satisfy the condition of the bond. The contract, is recited, and the condition of the bond required that *Passerieux* alone should pay. All that Valentour undertook to do was to be liable for the penalty, if *Passerieux* did not pay according to the condition of the bond. While *Passerieux* made the monthly payments, there was no breach of the condition. After the breach Valentour could discharge himself only by the payment of the penalty: *Silverthorn v. Hollister*, 87 Pa., 431." Again, "When executions were from time to time issued on this judgment they were issued to enforce the liability for the penalty. They could not have legally issued, on this judgment, to collect anything but the penalty. Valentour has paid on such executions the amount for which he is liable, with interest and costs, and his liability is discharged."

In a well considered opinion by Judge Moser in Commonwealth v. Finn and O'Gara, 27 D. R. 32, the learned judge came to the conclusion, that "Where a bond given for support is in a penal sum with a warrant of attorney to confess judgment and contains a condition that the principal shall pay his wife a certain sum per month, but contains no condition that the surety shall pay such sum per month, and after the default by the principal judgment is entered for the penal sum and collected in full from the surety on a writ of fieri facias, the bond and warrant of attorney are exhausted, and the surety is relieved from further liability thereon."

In the case before us, John M. Adam did not stipulate to pay Mary Stauffenburg the sum of \$15 per month for the support of herself until otherwise ordered by the court. He stipulated that if John Stauffenburg did not so pay to his wife, he, Adam, became "indebted to the Commonwealth of Pennsylvania in the sum of three hundred dollars to be levied of" his goods and chattels, lands and tenements. He did not bind himself for a levy of more than \$300 of his goods and chattels, lands and tenements. As he and his estate have already paid over \$300 because of Stauffenburg's defaults, the right of collection has been exhausted, and the estate is relieved from further liability.

AND NOW December 17, 1920 plaintiff's motion is refused.

Hart vs. Hart.

Ejectment - Pleadings - Acts of May 8, 1901, P. L. 142; June 7, 1915, P. L. 887 and June 12, 1919, P. L. 478 - Act of March 14, 1872, P. L. 25 - Res adjudicata - Act of April 2, 1907, P. L. 43.

The Act of March 14, 1872, P. L. 25 relating to ejectments is still in force notwithstanding the Acts of May 8, 1901, P. L. 142, June 7, 1915, P. L. 886 and June 12, 1919, P. L. 478.

A final judgment, between the same parties or their privies, on the same subject matter, though in a different form of action is conclusive and bars any further action between them.

Motion for judgment non obstanti veredicto. No. 56 January Term, 1919.

E. D. Smith and W. L. Kramer, for motion.

A. D. Knittle and B. V. O'Hare, contra.

KOCH, J. December 20, 1920.

The suit was commenced against Kate Hart alone. In an affidavit attached to the praecipe, it is averred that, "Jennie Lowery, Bowman Hart, Fred Hart and Kate Hart are claimants to the land in dispute," and the sheriff served the writ on the four parties named, as required by the Act of 23rd April, 1903, P. L. 261. Kate Hart is alone in actual possession of the premises and all the parties are brothers and sisters to each other. The act of 1903 makes the four persons served parties defendant in the case. The legal title to the property is in the name of Harry Hart, but the defendants claim that he holds the title subject to a resulting trust in favor of his two brothers, his two sisters and himself. The pleadings do not conform to the requirements of of the second section of the act of 8th. May, 1901, P. L., 142, as amended by the acts of 7th June, 1915, P. L. 887 and of 12th June, 1919, P. L., 478. The only pleading which appears in answer to the plaintiff's praecipe, affidavit, declaration and proof of title is a plea of "Not guilty" by Kate Hart. We called counsel's attention to the state of the plead-

ings when the case came before us for trial, and plaintiff's counsel agreed that the defendants could claim by adverse possession, or by deed or anything else. So the trial proceeded. Neither party objected on account of the state of the pleadings then and neither of the parties object now, after the case has been tried and the verdict of the jury has been rendered. Nor do I think that either party can now successfully complain on that score, notwithstanding the language of the acts referred to, that, "no action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed; nor shall any evidence be received on the trial of such action of any matter not appearing in the pleadings, subject to the power of amendment." See *Thompson v. Cross*, 16 S. & R 350; *Sauerman v. Wickerly*, 17 S & R 116; *Baxter v. Graham*, 5 Watts 418; *Clement v. Hayden*, 4 Pa. 138; *Lewisburg etc. Railroad Company v. Stees*, 77 Pa. 332; *Collum v. Andrew*, 6 Watts 516; *Good Intent Co., v. Hartzell*, 22 Pa. 277; *Barker v. McCreary*, 66 Pa. 162; *Ins. Co., v. Murphy*, 17 W. N. C. 243; *Noble v. Erwin*, 50 Superior Court 72 and *McBride v. W. Pa. Paper Co.*, 263 Pa. 345, 348. And I think that the Act of 14th Mar. 1872, P. L., 25, 1st. Purd., 312 plac. 7, is still in full force notwithstanding the "Practice Act nineteen fifteen," P. L., 483, and also notwithstanding the above mentioned acts relating to ejectment. The first section of the act of 1872 provides that, "In all actions brought or hereafter to be brought in the several courts of this commonwealth, no verdict shall be set aside by reason of the want of a declaration or plea, or from defectiveness or indefiniteness in the form of said verdict, but the court in which said verdict shall have been rendered shall have power, at any time, to direct the filing of a declaration, the entering of a plea and the filing of all such description or amended description, if in an action of ejectment, as in the judgment of the court shall make the pleadings and record conform to what was tried before the jury and found by the verdict."

This case was tried fully on its merits and the jury rendered its verdict in favor of the defendants, thus finding all the matters of contention against the plaintiff. But it will further clearly appear in the course of this opinion that the verdict would give the defendants more than they claim, because their claim is, and the evidence offered in support of it shows, that, while Harry Hart alone holds the legal or paper title to the premises in question, if he so holds it in trust, he holds it equally for himself and his four brothers and sisters. Hence the verdict of the jury should have been in his favor for, at least, an equal undivided fifth interest in the premises described in the writ, if under the facts in the case he was not entitled to a verdict for the entire premises described in the writ.

Porter Hart and Mary Hart, the father and mother of these contestants, became separated about the middle seventies, he going away from his wife and children who remained living in the house, which belonged to him, in the borough of Shenandoah. He never returned to his family or seems to have concerned himself about his family. In the eighties his creditors caused his house to be sold on one or more judgments against him, and his family was obliged to vacate the premises and rent another dwelling house. John H. Klock, a neighbor, owned a dwelling house nearby, and an arrangement was made whereby Harry Hart bought it from Klock on the 28th. of March, 1889. In the course of a few weeks thereafter, Mrs. Hart and her children moved into the Klock house. The evidence clearly shows that when the bargain for the purchase of the property was made \$50 was paid as down money and that when the deed was delivered the balance of the consideration money, to wit \$2350 was paid to Klock by Harry Hart who borrowed the money from the Citizens' Building and Loan Association. He took out thirteen loans, or shares, at a premium of \$15 each and pledged them in a mortgage on said house to said association. Hart, therefore, obtained \$2405 as a loan on a property for which he had paid only \$2400. When he paid

Klock he received a receipt in full for the consideration money. Harry was then twenty-one years old, Jennie thirty, Bowman twenty-five, Kate nineteen and Fred seventeen. It is claimed by the defendants that the title was put in Harry's name as a matter of convenience, because, owing to the father still being alive, the association would not lend the money to the mother.

Harry got into arrears with the Building and Loan Association and was obliged to give it a new mortgage on the 4th. of May, 1900 to secure a loan of \$2200. The first mortgage was not satisfied of record until the 9th. of December, 1915. The second mortgage was satisfied on the 30th. of January, 1912. In the meantime, to wit, 27th. December, 1906, Harry Hart borrowed an additional eight hundred dollars from said association for use in his private business, and gave a mortgage to secure that sum. The third, or last mortgage, was satisfied on the 7th. of June, 1918.

Porter Hart, the father of these contestants, died about the year 1900, and Mary Hart, the mother, died in December, 1916. Now the contention of the defendants is, that, as the mother could not take title in her name, it was agreed among all that the title should be placed in Harry's name until after the father's death, when it could be put in the mother's name; and, if the father survived the mother, then the property was to go equally to the five children. The house was the family home until Mrs. Hart died, and Kate, who is single, still occupies it. Harry lived there until he got married about 1892; Fred lived there until he got married and for eleven or twelve years afterwards, and it was always the home of Jennie and Bowman until they got married and established their own homes. No definite rent was ever paid Harry Hart.

The four defendants named claim a resulting trust in their favor under the following state of facts which they allege, and which the jury, by their verdict, seem to have found in the four defendants' favor. When the negotiations were begun to procure the property the Hart family was wholly

without means to purchase it, and then the kindly offices of one Charles Wasley, the secretary of the said association and a friend of the family, were enlisted. He told them that they would have to raise \$300 among themselves to pay the down money and to make certain improvements before the association would agree to loan the money to buy the property, and he also told them that the property could not be in the name of the mother, because the father was living. The family raised the \$300, which was made up by some cash that had been received by members of the family for tickets which had been so'd for the benefit of one John Finley, whose eyes had been blown out at the Kehley Run Colliery, by \$25 in cash contributed by Jennie, by wages of the boys, by earnings for sewing by Mrs. Hart and Kate. The money was then handed over to Mr. Wasley who attended to the business of paying the down money and for the repairs to the property. Mrs. Hart always paid the monthly dues by money which she earned or received from her five children. That different members of the family took the monthly payments to the saving fund is beyond dispute, but Harry swore most positively that all the money so taken to the fund was wholly his own, and he further testified most positively that the money that was paid for the property was his own, and that no repairs were made at the property until after they moved in. The testimony in the case is contradictory.

During the trial of this case, the plaintiff put in evidence the record in a suit in equity brought in this county to No. 4 May Term, 1917, wherein the said Jennie Lowery was complainant and the said Harry Hart was defendant. It was a bill in equity in which the plaintiff set forth substantially the same controlling facts as were offered on the trial of this ejectment case, and the prayers in the bill were for an order to restrain Harry Hart "from in any wise selling, conveying or disposing of said real estate **** or of any part thereof, or any interest therein, or in any wise encumbering the same," and further that, "Harry Hart be

ordered and directed by good and sufficient deed, in fee simple, to grant and convey a full, equal and undivided one-fifth interest in said real estate to each of the following children of Mary Hart, deceased, to wit: Jennie (Hart) Lowery, Bowman Hart, Kate Hart and Fred Hart, either jointly or singly as may be decided is just and equitable under the facts and law in this case." After full hearing on bill, answer and replication, a decree nisi was entered in Harry Hart's favor on December 24th, 1917. The final order in that case, reads as follows: "And now, March 4th, 1918, this case came on to be heard before the court in banc on forty-one exceptions filed by the defendant to the findings of fact and conclusions of law of the chancellor, and after argument by counsel, and upon due consideration of each and all of said exceptions, it is finally ordered, adjudged and decreed that said exceptions be overruled; that the bill of complaint be dismissed and that the complainant pay the costs." For the chancellor's findings see *Lowery v. Hart*, 14 Schuylkill Legal Record, 12.

No appeal was taken from the final decree of the court. The plaintiff offered the record in that case to show that the controversy in the present case became *res adjudicata* by virtue of the decree in that case. That case involved exactly the same state of facts as this case. The facts necessary to sustain a decree in the complainant's favor in that case are the same facts upon which the defendants were obliged to depend for a verdict in their favor in this case. The defendant there is the plaintiff here, and the complainant there is one of the defendants here. And she commenced that case for the benefit of not herself alone but for the equal benefit also of the said Kate Hart, Bowman Hart and Fred Hart. They all appeared and testified in Mrs. Lowery's behalf in her case, but neither side moved to make them, or any of them, parties complainant to the case. On the trial of this case, Kate Hart, Bowman Hart and Fred Hart showed that, at the instance of Harry, each of them separately wrote a letter to A. D. Knittle, Esq., who was

Jennie Lowery's counsel in that case, and who is now counsel for Kate Hart in this case. The letter was written before Jennie Lowery filed her bill of complaint. In effect, the letters were all the same, that from Kate to Mr. Knittle saying, "I never authorized my sister, Mrs. Lowery to put a claim against my brother, Harry Hart, or for you to act for me and I will have nothing to do with her or I ever retained you. Yours truly, Kate Hart." When Kate, Bowman and Fred wrote those letters to Mr. Knittle, Harry Hart knew of Mrs. Lowery's intention to begin litigation, and each one claims to have been induced by Harry to write the letter upon the promise that he would settle with them out of court.

In charging the jury we reserved the plaintiff's thirteenth point to be disposed of thereafter if deemed necessary;; which point is: "That under all the evidence in the case the verdict of the jury should be for the plaintiff for the premises described in the writ, with six cents damages and costs." If the matter became *res judicata* in the equity proceeding, this point should have been affirmed and a verdict directed in the plaintiff's favor.

"Where the subject or question in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed. The peace of the community is the great desideratum and nothing ought to be tolerated that would disturb it unnecessarily. Before the rendition of a judgment the court is presumed to be made acquainted by one or the other, or by both of the parties, with everything that is necessary to be known, in order to procure a correct decision upon the case; so that the judgment of the court, not being pronounced until after it has been so informed, must be taken and considered as corresponding and answering fully to the claims of justice. It is therefore altogether inadmissible to say, that a renewal of a contest shall or

ought to be permitted, because the first decision was not just or right:" *March v. Pier*, 4 Rawle 272, 288. "**** a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter and becomes the law in the case which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed." *Ibid* 289.

"Whatever may be the form of action, if the original question appears to have been the same and the same evidence will support both actions, and judgment be had on the merits, it bars all other actions for the same cause." *Cist v. Zeigler*, 16 S. & R. 282, 284.

A final judgment between the same parties or their privies on the same subject matter, though in a different form of action, is conclusive and bars any further action between them. *Marsh v. Pier*, 4 Rawle 272; *Estep v. Hutchman*, 14 S. & R. 435, 437; *Cist v. Zeigler*, 16 S. & R. 282; *Brenner Trucks & Co., v. Moyer*, 98 Pa. 274; *Bolton v. Hey*, 168 Pa. 418; *Bell v. County of Allegheny*, 184 Pa. 297; *Devlin's Estate*, 199 Pa. 250. Nor does the case of *Walker v. City of Philadelphia*, 195 Pa., page 168 upon which defendants put reliance change the principle of law which is settled by the cases just referred to.

We note, however, that Mr. Justice Mitchell said in *Eichert v. Schaffer*, 161 Pa. 519, 522: "The general principle insisted on by the appellant that a judgment settles the issue once for all between the parties is not questionable, but it has a recognized exception in the action of ejectment, which the appellant seems to have overlooked." But, since the rendering of that decision on the 21st of May, 1894, an action of ejectment is no longer an exception to the doctrine of *res judicata*, because ejectment is now limited to a single action by virtue of the Act of 8th May, 1901, P. L. 142 and the act of 2nd April, 1907, P. L. 43. *West v. Hanna*,

57 Superior Court, 445. It is equally clear that all parties and privies to the action in equity between Jennie Lowery and Harry Hart are concluded by the final judgment therein rendered. Jennie Hart is surely concluded by it. So far as she is concerned, she cannot now be heard to show that she is a beneficiary in a resulting trust; and yet by virtue of statutory law she became a party to this case. But as the judgment in her case in equity concluded her rights, she has no right that can now avail her as a defence here. Not only are the parties in the equity case concluded by the judgment, but so also are the privies; for "Whenever parties are bound by a decision, so also are privies in blood, in estate and in law." *Estep v. Hutchman*, 14 S. & R., 435, 437. Although Kate, Bowman and Fred Hart were not made parties to the record, as they should have been, in the equity case, yet they were parties in interest and were fully heard as witnesses in the case. Their opportunity as witnesses there was as ample in every respect as it was as witnesses in this case. "Under the term parties in this connection, the law includes all who are directly interested in the subject matter and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen, that the term privity denotes mutual or successive relationship to the same rights or property. The ground, therefore, upon which persons standing in this relation to the litigating parties are bound by the proceedings, to which he is a party, is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped

from litigating that which is conclusive upon him with whom they are in privity." 1 Greenleaf on Evidence, Section 523. See also Peterson v. Lathrop, 39 Pa., 223; Giltinan v. Strong, 64 Pa., 242; Strayer v. Johnson, 110 Pa. 21 and Walker v. Philadelphia, 195 Pa. 168.

If the defendants here are not all concluded by the judgment as parties thereto in the equity case then they are concluded as privies. "The term, privity, denotes mutual or successive relationship to the same rights of property; and privies are distributed into several classes according to the manner of this relationship. Thus, there are privies in estate, as, donor and donee, lessor and lessee, and joint-tenants; privies in blood, as, heir and ancestor, and coparceners; privies in representation, as, executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as, by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law. The ground upon which admissions bind those in privity with the party making them, is, that they are identified in interest; and of course the rule extends no farther than this identity. The cases of coparceners and joint-tenants are assimilated to those of joint promissors, partners and others having a joint interest *****." 1 Greenleaf on Evidence, section 189.

When parties and the subject matter are the same and a judgment is obtained it is conclusive without regard to whether it was right or wrong. Nor are there any grounds for distinction between courts of equity and courts of law in this respect. Upon this subject equity follows the law. Chandler's Appeal, 100 Pa. 262, 265 and 266. If it be true as contended by the defendants, that all the money which was paid down and for repairs when the property was bought, and that all payments made for money borrowed to buy the property, was the money of Mrs. Hart who held the purse for the family and managed and controlled it herself, then Harry Hart became trustee for her and so held the

paper title. But under the terms of the trust he was to hold it only until her husband died and then he was to transfer the title to her, or, if he survived her, then to transfer the title to the children. Mrs. Hart survived her husband sixteen or more years and she should have seen to it that Harry, her son, transferred the property to her during that time. Not having done so, Jennie Hart Lowery, as one of Mrs. Hart's heirs, brought suit against Harry, but her proofs did not make out her claim and the case went against her. If Mrs. Hart had the equitable title at her death, her interest descended to her children, who were privies in blood, and, therefore, the conclusiveness of the judgment against Jennie Lowery abates nothing in its conclusiveness against all those who are privies in blood. The plaintiff was entitled to have his thirteenth point affirmed upon the ground of *res judicata* alone. And it is, therefore, not necessary to consider whether all the other evidence in the case is so clear, precise and indubitable as to create a resulting trust in favor of Kate Hart, Bowman Hart, Fred Hart and Jennie Lowery.

AND NOW DECEMBER 20, 1920, the motion in arrest of judgment upon the verdict of the jury is allowed, and the prothonotary is directed to enter judgment in favor of the plaintiff for the premises described in the writ and for six cents damages and costs, upon payment of the jury fee, and the motion for a new trial is overruled.

Home Brewing Co. vs. Thomas Colliery Co.

Lateral support - Limitation of the right to equitable interference - Damages - Uncertain results - Character of injuries.

In the absence of malice, wantonness or negligence the right to equitable interference as to lateral support is restricted to the land in its natural condition and such right cannot be enlarged.

Equity will not interfere where the injury can be compensated in damages, nor where the effect of the act or threatened act is speculative, uncertain or problematical, nor where greater injury will be done by enjoining than by leaving the party to his redress at law. Bill in Equity, No. 1, January Term, 1905.

E. D. Smith, W. L. Kramer and O. E. Farquhar, for plaintiff.
M. M. Burke, D. W. Kaercher and H. S. Drinker, for defendant.

C. V. Henry, P. J. 52nd. Judicial District, Specially presiding.
February 8, 1921.

This case is now before the Court upon exceptions to the findings, refusals of request for findings of fact conclusions, refusals of requests for conclusions of law, and decree entered by the learned Chancellor sitting in the above entitled proceeding.

Following the death of Judge Brumm, who heard the case, the exceptions were argued and after opportunity to read the voluminous testimony, the case was finally argued on May 27th. 1920.

The history of the case is fully and clearly set forth in Judge Brumm's Opinion.

We assume that the Chancellor's findings of fact are conclusive unless clearly not sustained by the evidence, and some of these facts are outstanding as having an important bearing upon the ultimate disposition of the case. The controlling facts as found by the Chancellor, or clearly established by the evidence, are, that the claims of the Plaintiff are based upon the right to lateral support for its land; that

no negligence is alleged by the plaintiff, either in the bill or amended bill and the Chancellor so found in affirming the defendant's Twenty-fourth request for finding of fact; that no negligence by the defendant is shown by the evidence unless it arises from the removal of the coal, or more coal than should be removed for the safety of the surface of the land of the plaintiff; that no negligence can be predicated upon the future operations of the defendant unless it be from the mere act of removing the coal, for the Chancellor found in affirming defendant's Twenty-fifth request for finding of fact that there is no evidence in the case that defendant is conducting or proposes to conduct its mining operations in a negligent manner or in any other than a careful manner, and in accordance with the most approved method of modern mining; that no injury was suffered by plaintiff's property prior to 1916, when cracks appeared in the cement floors with some settling or pulling or subsidence as evidenced by separation of walls and slight displacement of machinery; that at the time of filing the bill in November, 1904 cracks in the surface were 38 feet from plaintiff's property; that the cause of these cracks, possibly involving a drag or subsidence, was probably insufficient pillar support left in the course of first mining prior to the bringing of this suit, such first mining having been completed many years ago by the predecessor of the present defendant; that no practical remedy was suggested by the plaintiff for this admittedly dangerous condition; that the effect of further mining, also called robbing, re-robbing or final mining, in the enjoined territory, in the opinion of the engineers and other witnesses for the plaintiff, would be to cause further subsidence to the surface of plaintiff's property and endanger its buildings and possibly the lives of its employees, while in the opinion of the defendant's witnesses the only relief for the present situation as well as protection for the future, is to take out all the remaining pillars, according to approved mining methods, by what is known as "robbing back" by which the pillars are taken out

and the top allowed to break and fill the vacant space caused by the removal of the coal, it being conceded that such broken material increases its bulk fifty per cent., the contention of the defense being that the pillars left by first mining are insufficient to adequately support the overlying strata and yet are of sufficient size to prevent the top from freely breaking and filling mined spaces; that the effect of future mining was thus uncertain, speculative and problematical; that a continuance of the injunction will prevent a large quantity of coal, possibly four hundred and fifty thousand (450,000) tons, from being mined; that the injury, of which the law takes cognizance, suffered by the plaintiff up to this time can be readily measured in damages.

The pleadings, the evidence, and the findings of the Chancellor established that the claims of the plaintiff are based upon a violation or prospective violation of the right to lateral support of its land; and this leads to a consideration of the limitation of the right of lateral support and the limitation of the right to equitable interference for a violation of that right. In the absence of malice, wantonness or negligence, under all the authorities in Pennsylvania, this is restricted to the land in its natural condition, and equity cannot enlarge this right.

Richard vs. Scott, 7 Watts, 460, McGettigan vs. Potts, 149 Pa. 155, Matulys vs. Coal & Iron Co, 201 Pa. 70, 76, Malone vs. Pierce, 231 Pa. 534, 537, Cooper vs. Altoona C. C. & S. Co. 231 Pa. 557, Durante et al vs. Alba, 266, 444, Jones vs. Greenfield, 25 Pa. Sup. Ct. 315, McClellan vs. Schwerd, 32 Pa. Sup. Ct. 313, Freseman vs. Purvis, 51 Pa. Sup. Ct. 506, McKeand vs. Kkiv, 55 Pa. Sup. Ct. 28.

And the same rule has been applied to claims for personal injuries.

Mc Mullen vs. Un. Drawn Steel Co., 47 Pa. Sup. Ct. 570.

Negligence as here contemplated, that is in a withdrawal of lateral support, means positive negligence or want of due care in the mining or excavating so far as they affect or are likely to affect, adjoining improvements.

Matulys vs. Coal & Iron Co., 201 Pa. 70, 74.

And it has been held that the words "skillfull and careful mining" relate to the manner of taking out the coal and that taking out all the coal is not in violation of this stipulation.

Miles vs. N. Y. S. & W. Coal Co., 250 Pa. 147, 154, Youghiogheny River Coal Co. vs. Alleghney National Bank, 211 Pa. 319, Kellert vs. Rochester & Pittsburg Coal & Iron Co., 226 Pa. 27.

No negligence, malice or wantonness is alleged and the Chancellor has found that the prospective mining by the defendant is to be according to approved modern methods, so we are only concerned with injuries or threatened injuries to the surface of plaintiff's land in its natural condition. These injuries at the time of bringing this suit in 1904 were due to "first mining" by the predecessor of the defendant, and consisted of cracks in the surface the nearest being thirty-eight (38) feet from the plaintiff's property. In 1916, there were some cracks in the cement floors of the plaintiff's buildings, some evidence of pull or subsidence as indicated by the machinery and buildings, also due to said early mining by the predecessor of the defendant. The injuries to the surface of plaintiff's land, suffered up to this time, as indicated by the evidence, were not serious and could readily be measured in damages. The rule is so well established as to hardly need the citation of authority, that equity will not interfere where the injury can be compensated in damages.

Richard's Appeal, 57 Pa., 105.

The threatened injury by reason of final mining, is purely speculative. The plaintiff's engineers and experts are of the opinion that to remove any more coal within the enjoined area will increase the danger and injury to plaintiff's land; the defendant's engineers and experts are of the opinion that the practical remedy for the present condition is to take out all the remaining pillars of coal by robbing back and permitting the roof to break and fill the mined out spaces, known as the "gob" system of mining,

and they further are of the opinion that mining out the remaining coal by this system will not increase the danger to, or result in injury to the plaintiff's land. The result of future mining under this evidence and as found by the Chancellor is matter of doubt. On the one side or the other it rests purely on the opinion of expert witnesses. The Chancellor's findings indicate that there was some doubt as to the cause of the disturbance on the surface of plaintiff's land, that it might be due to insufficient pillar support left in first mining; but that it also might be due to the action of the elements upon these pillars and the rotting of timbers in unused portions of the mine. He found that there was uncertainty with respect to the remedy for the existing condition and he felt there was uncertainty of the result of future operations and methods of mining, altho he did find that the proposed mining operations of the defendant were to be conducted according to approved modern methods. The conclusion is compelling, that the effect of taking out additional or all the remaining coal is uncertain and speculative. Where the effect of the act or threatened act is speculative, uncertain or problematical, equity will not interfere by injunction.

Rhodes vs. Dunbar, 57 Pa., 274. Huckenstine's Appeal, 70 Pa. 102, 107. Berkey vs. Berwind-White Coal Mining Co. 220 Pa. 65. Freseman vs. Purvis, 51 Pa. Sup. Ct. 506, 513.

Another consideration entitled to weight in the disposition of this case is that while the injury suffered by the plaintiff is not great and can be measured in damages, and the threatened injury from future mining is uncertain and speculative, the effect of making permanent the injunction would be to permanently condemn and keep from the market approximately four hundred and fifty thousand (450,000) tons of coal. The benefits accruing from restraining the removal of the coal are greatly disproportionate to the injury inflicted upon the mine owners or operators and the public. It is well established that equity will not restrain if it ap-

pears that greater injury will be done by enjoining than by leaving the party to his redress at law.

Richard's Appeal, 57 Pa. 105. Huckenstine's Appeal, 78 Pa. 102. Coal Co. vs. Mellen, 152 Pa. 286. Berkey vs. Berwind-White Coal Mining Co., 220 Pa. 65. Streng vs. The Buck Run Coal Co., 241 Pa. 560, 564.

The Chancellor invoked this rule in consideration of the fact that the future mining might affect a church, a school and private residences, and while it is true that a court of equity might consider the manner in which the public might be affected by threatened injury, we do not think this position is entitled to much consideration unless the general public are involved. Neither the church authorities, the school authorities, the owners of the residences in the vicinity, nor the public authorities have seen fit to intervene in this litigation, and it would seem to follow that there is little general fear of either the public safety or the parties indicated.

Reliance has been placed upon the case of Wier & Bell's Appeal 81* Pa. 203 to sustain the position of the plaintiff and justify the enjoining of the operations of the defendant. In this case the defendant operated a quarry on a steep hillside immediately below and adjoining the land of the plaintiff. As a result of the quarrying operations, a large portion of the surface of the plaintiff's land had fallen into the defendant's quarry and the important finding of fact was that a continuance of the quarrying operations to the line of plaintiff's land "would materially injure, if it would not wholly destroy, that portion of his property for its natural uses." The threatened danger was the destruction to the surface of the plaintiff's property and, it was sure to follow the removal of the lateral support to his land.

In passing upon the exceptions filed in this case, we are therefore compelled to adopt the following general conclusions:-

1. The claim of the plaintiff is based upon an alleged violation of the right to lateral support for its land.

2. No negligence being alleged in the pleadings and the proposed future mining of the defendants being according to approved modern methods, the only protection the plaintiff can ask in law or in equity, is for its land in its natural condition, without regard to buildings, improvements or employees connected therewith.

3. The present injury to the surface of plaintiff's land, due to first mining by the predecessor of the defendant, can be readily measured and compensated in damages.

4. The effect of future mining, or final mining, is uncertain, speculative and problematical.

5. The injury resulting from enjoining the removal of the remaining coal by the defendant would be greatly disproportionate to the benefits resulting therefrom to the plaintiff, or the protection guaranteed to it, by reason of such injunction.

Pursuant to the foregoing general conclusions, the Exceptions are disposed of as follows:-

Plaintiff's Exception No. 1.

"The Court erred in admitting the following evidence, viz:

THOMAS REESE, a witness for the plaintiff, on cross examination, was asked: (590)

'Did you make an examination of the Buck Mountain vein at Buck Run colliery in Schuylkill County?'

Mr. Smith— Objected to as immaterial and irrelevant.

The Court— We overrule the objection. Note an exception. Plaintiff excepts. Bill sealed.

This exception is overruled and dismissed. The question under consideration was the effect of different methods of mining and this led to the effect of mining in other mines under similar conditions. Such evidence could be received to supplement the opinions of witnesses, but here the question was asked upon cross examination and was certainly proper as affecting credibility, and for comparison, especially where the witness has given an opinion, as an expert, of the effect of certain methods of mining.

Plaintiff's Exception No. 2.

"The Court erred in admitting the following evidence, viz:

THOMAS REESE, a witness on the stand under cross examination: (597)

'What opinion did you give as to the question of robbing at the Buck Mountain vein at Buck Run collieries?'

Mr. Smith— Objected to as immaterial and irrelevant what opinion he gave as to the question at Buck Run and not a cross-examination.

The Court— That is, what opinion did he give at that time?

Mr. Kaercher— Yes.

The Court— I think we will let him answer that question because you certainly would have a right to read over his testimony to see what opinion he gave and then ask him with reference to it.

Plaintiff excepts. Bill sealed.

This exception is overruled and dismissed. The cross-examination was certainly proper as affecting credibility. If the opinion given by the witness at some other time with reference to the same methods of mining under similar conditions is at variance with the opinion now given, it would affect credibility.

Plaintiff's Exception No. 3.

"The Court erred in admitting the following evidence, viz:

W. G. THOMAS, a witness for the defendant. Direct examination. (631).

'Q. What is the number of employees at this operation?'

Mr. Smith— Objected to as immaterial and irrelevant.

The Court— The plaintiffs were permitted, under objection from the defendant, to show the condition of the brewery, with a view of showing the injury that might be done, the extent of it, not only to the property but even going possibly to their refrigerating plant, to the lives of persons. We permitted that against the protest of the

plaintiff. Upon the same principle we think it is proper that we should permit the defendants to show the extent of injury that they may be put to, especially with reference to whether the public is interested and to what extent, against the protest of the plaintiff, it being a matter entirely for the Court.

We overrule the objection.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. It was proper for the court to receive evidence bearing upon the question whether greater injury might not be done by enjoining than by leaving the parties to their rights at law. The effect of issuing an injunction is an important consideration for the court.

Plaintiff's Exception No. 4.

"The Court erred in admitting the following evidence, viz:

W. G. THOMAS, a witness for the defendant. Direct examination: (633).

'Q. Are you prepared to state for the information of the Court what the extent approximately is of the investment in this operation?'

Mr. Smith— We object to the inquiry.

Mr. Burke.— We urge it for the same reason, that it is proper that the Court should know this.

The Court.— We overrule the objection. It is pretty hard to determine just exactly where they should stop.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The evidence was properly admitted to show the effect of enjoining the operation of the mine by the defendant.

Plaintiff's Exception No. 5.

"The Court erred in admitting the following evidence, viz:

W. G. THOMAS, a witness for the defendant. Direct examination: (634).

'Q. Can you tell us then, basing your reply upon your

knowledge of the conditions in this mine and the quantity of coal tied up by this order of Court, what effect it has upon the life or continued operation of this plant?"

Mr. Smith.— Objected to as immaterial and irrelevant to any issue before the Court. It is self-evident that an injunction stops the working of a colliery. Beyond that it is no subject of legitimate inquiry.

The Court.— The matter as to how it will affect the life of the plant by restraining the operation within the lines of the injunction we permit them to show.

Plaintiff excepts. Bill sealed."

Plaintiff's Exception No. 6.

"The Court erred in admitting the following evidence, viz:

W. G. THOMAS, a witness for the defendant. Direct examination: (635).e

'Q. You may explain to the Court why your company has not urged earlier final disposition of this injunction order?"

Mr. Smith.— Objected to

Mr. Burke.— We withdraw the question and make an offer. We propose to show by this witness upon inquiry that the earlier disposition of this injunction order, final disposition of it on the part of the defendant company, was not urged by the company for the reason that they were able to operate this colliery from the coal obtained in other portions of this mine.

Mr. Smith.— Objected to, further that the witness was not with the company until more than a year after the granting of an injunction.

Mr. Burke.— He has been working for this Company all but three months of the time it has been operating the plant.

The Court.— We overrule the objection.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. Delay in prosecution of the suit may be explained. The plaintiff now

contends that the defendant should be estopped to question the propriety of the proceeding in Equity because of failure to press the action to final determination. Of course, either party could have hastened disposition of the case but in view of the position taken by the plaintiff, the delay was certainly explainable.

Plaintiff's Exception No. 7.

"The Court erred in admitting the following evidence, viz:

BAIRD HALBERSTADT, a witness for the defendant.
Direct examination: (789).

Mr. Kaercher.— He has specimens marked on here as far as that is concerned. With that explanation we offer this blue-print. (Strata at Buck Run Colliery).

Mr. Smith.— Plaintiff objects to the blue-print for the reason stated in the objection to the testimony of the witness. The testimony is irrelevant and immaterial.

The Court.— We overrule the objection.

Plaintiff excepts. Bill sealed.

(Map marked Exhibit No. 28, 11-17-15, H. E. G.)."

This exception is overruled and dismissed. This evidence was properly received for the same reason that the evidence of experts who testified as to results of methods of mining where conditions were similar, was received. It was proper for comparison and in support of opinions.

Plaintiff's Exception No. 8.

"The Court erred in admitting the following evidence, viz:

CHARLES J. GROFF, a witness for the defendant.
Direct examination (817).

'Q. Give us the condition that you found at New Boston beginning with the Buck Mountain bed?'

Mr. Smith.— Plaintiff objects.

The Court.— We overrule the objection.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The witness had previously testified as to the strata at Kehley Run

and the evidence was proper for comparison of methods of mining under similar conditions, and as supplementing the opinion of the witness.

Plaintiff's Exception No. 9.

"The Court erred in admitting the following evidence, viz:

CHARLES J. GROFF, a witness for the defendant.
Direct examination: (821).

Mr. Kaercher.— We now offer in evidence the cross-section and samples 1 to 45 as contained in the box and numbered 1 to 46.

Mr. Farquhar.— Plaintiff objects for the same reason as stated before—it is incompetent, immaterial and irrelevant.

The Court.— We make the same ruling.

Plaintiff excepts. Bill sealed.

(Cross-section above referred to marked Exhibit No. 31, 11-17-15 H. E. G.).

(Box of samples above referred to marked Exhibit No. 32, 11-17-15. H. E. G.)."

This exception is overruled and dismissed. The evidence was properly admitted for the same reason as that under the preceding exception. It was proper for comparison and in support of the opinion of the witness.

Plaintiff's Exception No. 10.

"The Court erred in admitting the following evidence, viz:

EXHIBIT No. 33 (Showing strata at Buck Run Colliery and New Boston colliery): (829).

The Court.— We overrule the objection for the reasons heretofore assigned.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The evidence was properly received for the purpose of comparison and as supporting the opinions of witnesses.

This exception is overruled and dismissed. The evidence was properly received for the purpose of comparison

and as supporting the opinions of witnesses.

Plaintiff's Exception No. 11.

"The Court erred in admitting the following evidence, viz:

EXHIBIT No. 34: (835).

The Court.— We make the same ruling. We may again add that the Court would very much like to have all that additional data. We do not feel that the Court has a right to dictate or force any person to make out their case in a manner, even that the Court might think it ought to be made out.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. This evidence was properly received for the purpose of comparison of the effects of methods of mining under similar conditions, and in support of opinions of witnesses.

Plaintiff's Exception No. 12.

"The Court erred in admitting the evidence of Daniel Kennedy under the offer and against the objection of the plaintiff as stated on page 1174.

The Court.— We overrule the objection and permit you to go on.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The offer was to show the effect of mining out all the coal in the Big Buck Vein in another mine where similar conditions existed.

Plaintiff's Exception No. 13.

"The Court erred in admitting the following testimony, viz:

JACOB M. HOLT, a witness for the defendant. Direct examination: (1252).

'Q. Where did you mine the Buck Mountain at Buck Run, how were the overlying measures effected by that mining?'

'A. I can tell you that we were driving gangways and doing breast work.'

Mr. Kramer.— We offer an objection to this. It is going

into details as to how they mined coal at Buck Run. I do not think that is material. I do not see that we are trying any suit at Buck Run.

Mr. Burke.— We will endeavor to allay the gentleman's fears. I will not go into the mining at Buck Run. I merely asked this witness as to the effect of mining out that coal measure at Buck Run and we rest with that as far as Buck Run is concerned. I am not going to ask him, and do not intend to ask him what the character of the mining there was; I do not think it is necessary.

The Court.— We have been very liberal all along, in allowing you to show the conditions in various collieries and we will not change the method now. We will overrule your objection.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The results, under similar conditions, in another mine where the method of mining contended for by the defendant was followed, were properly received in evidence.

Plaintiff's Exception No. 14.

"The Court erred in rejecting the testimony of William Griffith, called by the plaintiff, (1457).

Mr. Kramer.— We propose to prove by the witness, who is an expert in mining engineering, geology and has a very large experience, and we propose to rebut the theory that has been advanced by the defendant in this case with regard to the choking of the measure and the support of the overlying surface.

The Court.— That seems to me to be simply supplementing testimony that was taken before. Now we do not agree to open up that whole question again. We cannot tell where that will lead to.

Mr. Kramer.— We are here to rebut these witnesses, who have said that the removal of the coal in the underlying veins will choke sufficiently well to support the surface of the overlying veins, and that in turn support the surface of the Home Brewing Company. We have never

offered any testimony in rebuttal on that theory. We now have an expert upon that particular subject, who is by experiment bound to find the consequences of those acts and has tested the strength of the supporting power of the coal and the overlying strata and of broken material and we think it is very important here.

The Court.— We recognize the importance of time, too, and the orderly way of trying your suit. You have had your engineers, who have testified on that subject, that is, a number of them, Mr. Dodge here; you had experts. The defendants have contradicted that by a number of their engineers and now it becomes a question of numbers of witnesses. When you get through, they may send for some experienced persons and in sur-rebuttal offer them in evidence. Now where is this going to end? I want all the light I can get, but I do not think that we ought to open the door for this method of arriving at the facts.

Mr. Kramer.— We think this is clearly rebuttal and we have offered no testimony to rebut that.

The Court.— Do you propose calling any others than this one on that?

Mr. Kramer.— Not in this particular line. We have one other as to effect of mining and subsidence, by his practical experience in the City of Scranton.

The Court.— We feel as though we ought not to allow it.

Mr. Burke.— We object to this because it is not in rebuttal of anything offered by the defendant company; that the testimony embraced in the offer just made was part of the plaintiff's case in chief, which the defendant sought to contradict by offering evidence to the contrary. We object, that it is not rebuttal and is not admissible at this time.

(1460) The Court.— We decline to hear any more testimony on either side on the subject of their theory of the results of certain mining, based upon their opinion. We will, however, if the plaintiffs have any witnesses to show simi-

lar conditions, for instance, the same veins, practically the same strata, with relatively the same thickness of strata, thickness of veins, that have been mined, by what we now call the gob system and it has fallen to furnish equal support to similar conditions where they have mined and relied on the pillars alone for support, which would be in contradiction possibly, of the testimony with reference to William Penn and other practical, positive physical facts that have been shown by the defendant. We will permit you to do that, but nothing more, unless there is something new, of course. Perhaps I might add, so that it is definitely understood, in other words, we will not permit any more time to be taken up by putting on record merely the opinion of experts on the matters of fact already traversed.

(1466) Mr. Kramer.— It is for the purpose of contradicting the testimony of Mr. Auman, Mr. Heffner, Mr. Van Horn, Mr. Thomas and Mr. Randall.

The Court.— Now what have you to say?

Mr. Burke.— We object to that.

The Court.— We sustain the objection.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. Possibly under the view the Chancellor took of the case this evidence should have been received as tending to rebut the opinions of witnesses for the defendant. It was important if the case turned upon a preponderance of opinion but its rejection cannot affect the result in the view we now take of the case, that the threatened injury is uncertain and problematical, and that the proposed mining by the defendant is in accordance with approved modern methods, as established by the testimony and found by the Chancellor.

Plaintiff's Exception No. 15.

"The Court erred in overruling the following offer by the plaintiff.

WILLIAM GRIFFITH, plaintiff's witness, on the stand.

Mr. Smith.— The plaintiff proposes to show now that by the removal of the Buck Mountain vein of 12 feet in

thickness and of the Seven Foot vein of about seven feet in thickness and of the Skidmore vein of about five feet in thickness, making a total of twenty-four feet of coal, if the space were filled in by the fallen material from the overlying strata, and that the strata overlying the topmost vein named, namely, the Skidmore vein, was 340 feet, that it would result in the subsidence of the surface of approximately three and one-half feet, or in excess of three and one-half feet. This for the purpose of contradicting the opinion of Mr. Auman, Mr. Randall, Mr. Heffner, Mr. Van Horn and Mr. Thomas, when they swore that all of those veins could be removed without affecting the surface, without any subsidence of the surface.

The Court.— That is practically the same offer in different language and we rule it out.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. No harm could have resulted from the acceptance of this offer but it was rebuttal testimony, it was cumulative and the exception must be sustained for the reasons set forth in disposing of the 14th Exception.

Plaintiff's Exception 16.

"The Court erred in excluding the testimony of JAMES H. RITTENHOUSE, a witness called by the plaintiff: (1488)

'Q. Have you in your experience in the anthracite region encountered the situation where an underlying vein of coal was mined or robbed and affected the surface without affecting an intermediate vein?"

Mr. Kaercher.— We object to the question as being vague and indefinite and not based upon any facts appearing in this case.

The Court.— In view of our former rulings, which we have repeated several times, that we will not take up any time with the opinion of experts, I hardly see the necessity of questioning them at all. Call them as your witnesses and go on. Let us see what you want to prove.

Mr. Smith.— I did not ask for the witness's opinion; I

asked him for his knowledge.

The Court.— I know; I am now on the general proposition. You are trying to establish his competency as an expert. I say that is not necessary under the ruling that we have made, that we will not allow any opinion of experts on any matter that has been gone over heretofore. If you have any opinion that you want of an expert on matters that have occurred recently, new matter, of course we will entertain your offer on that proposition; but otherwise we will permit you to go on and examine him now until you come to a point at which the question as to whether it requires an expert or not arises.

‘A. I know of a number of such cases, yes.’

‘Q. Where were those instances?’

‘A. In the West Ridge colliery in Scranton, in the City of Scranton, and also at the Armory.

The Court.— What is the use going over that? If there is any point at which you can show certain conditions that exist there, and that they are similar to conditions existing here, you can go right on and do that without a general examination. Pin him down to some point and get at the facts, see what he knows.

‘Q. Give us the facts as to the Armory and the underlying veins there, what they were and what is the effect on the surface and on the intermediate veins, if any?’

Mr. Burke.— We object to that because it is not shown that the mines that may have affected the Armory or the other property.

The Court.— We are not going to permit him to give his opinion as to what caused the effect. He can state the conditions and not his opinion.”

This exception is overruled and dismissed. This evidence was properly excluded. The offer was to show experience without showing similarity of conditions. Moreover, there is nothing in this case to indicate that the cracks and evidence of subsidence on the surface were caused by an underlying vein and that the intermediate vein was

not affected. If the offer had extended to show that the conditions and methods of mining in the West Ridge Colliery were the same as at Kehley Run, the evidence might have been received. Two theories were in evidence supported by opinions of experts and the Court declined to hear further opinions set against opinions, as rebuttal evidence, when it was cumulative.

Plaintiff's Exception No. 17.

"The Court erred in sustaining the defendant's objection to the following question, viz:

James H. Rittenhouse, witness (1490).

'Q. Are you able to tell us, from what you have seen in the anthracite coal region, of the effect of fallen material in a mined vein, as to its supporting power of the overlying measures?'

Mr. Kaercher.— That is objected to, the witness not having been shown to have been familiar with conditions similar to those existing in the Kehley Run Colliery.

The Court.— As the question stands, we sustain the objection.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The question was too general and an additional reason for its rejection is set forth in the objection to the question. Results in other mines, without showing similarity of conditions, were not relevant evidence.

Plaintiff's Exception No. 18.

"The Court erred in sustaining the defendant's objection to the following question, viz:

JAMES H. RITTENHOUSE, witness. (1491).

'Q. Do you know of any place where the underlying veins have been mined or robbed and for a time the surface has remained intact, and after a time the surface has subsided, or the surface and the intervening veins have subsided?'

Mr. Burke.— That is objected to.

The Court.— The objection is sustained as the ques-

tion is put.

Plaintiff excepts. Bill sealed."

This exception is overruled and dismissed. The question was too general and the evidence was properly rejected in the absence of showing similarity of conditions at the mines with reference to which the witness was about to testify.

Plaintiff's Exception No. 19.

"The Court erred in its Statement of Facts as follows, viz:

'As stated, it is conceded on all sides, that the crevices and cracks in the brewery and adjacent buildings and on the surface near the brewery, are caused by reason of improper mining which was done before this bill in equity was filed in the year 1904.

The same error is repeated on page 22 of the Court's opinion, as follows, viz:

'FIRST.— That the subsidence of the surface was originally caused by improper mining before the bill was brought, to wit, the 14th day of November, 1904, and that the cause of said subsidence has not been increased or aggravated by any additional mining since that date as there has been no additional mining done since."

This exception is overruled and dismissed. The cause of existing conditions at the mine may not have been conceded in express words, but witnesses for both sides seem to take this view of the cause of the trouble. The evidence strongly indicated this fact. No additional mining was shown to have been done within the enjoined area, after the issuance of the injunction.

Plaintiff's Exception No. 20.

"The Court erred in its Answer to the Defendant's Twenty-First Request for finding of Fact, which request and answer are as follows, viz:

'21. That there is no evidence in the case that the defendant company presently intends to do any mining in the Mammoth or Skidmore veins within the area south of a

plane passing through the south surface line of the Girard Estate property north of the plaintiff's lots toward the north downward at an angle of seventy degrees with the surface to the bottom slate of the Skidmore vein, and extending east and west for a distance of fifty feet beyond the projection of the east and west boundaries of the plaintiff's lots.'

'We affirm this request for finding of fact.' "

This exception is overruled and dismissed. This finding corresponds with the attitude and position taken by the defendant and we recall no evidence to the contrary.

Plaintiff's Exception No. 21.

"The Court erred in its answer to the Defendant's Twenty-fifth request for Finding of Fact, which request and answer are as follows, viz:

'25. That there is no evidence in this case that defendant is conducting or proposes to conduct its mining operations in its leased tract in the territory covered by its mining lease and north of the plaintiff's lots or plant, in a negligent manner or in any other than a careful manner, and in accordance with the most approved methods of modern mining.'

'We affirm this request for finding of fact.' "

This exception is overruled and dismissed. The Court could readily find this fact from the evidence and therefore, it is not subject to exception.

Plaintiff's Exception No. 22.

"The Court erred in its answer to the Defendant's Eighth Request for Conclusions of Law, which request and answer are as follows, viz:

'8. That in equity a decree is never of right, as a judgment at law is, but of grace. Hence the Chancellor will consider whether he would not do a greater injury by enjoining than he would by refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear, he must refuse to enjoin.'

. We affirm this request for conclusion of law, as a gen-

eral principle of law.

This exception is overruled and dismissed. It is a correct statement of the law, but right or wrong could not affect the ultimate disposition of the case.

Plaintiff's Exception No. 23.

"The Court erred in its answer to the Defendant's Ninth Request for Conclusions of Law, which request and answer are as follows, viz:

'9. That the burden of proof lies upon the plaintiff and where the evidence touching a disputed fact is equally balanced or if it leaves the mind in a state of perplexity, or in case of doubt as to the plaintiff's right, or the imminence of danger, the uniform rule is for the Court to withhold its hand, especially where the injury which would result from granting the injunction is greater than that which would result from refusing it.'

We affirm this request for conclusion of law as a general principle of law."

This exception is overruled and dismissed. It is a correct statement of a general proposition or principle of law and in any event could not affect the disposition of the case.

Plaintiff's Exception No. 24.

"The Court erred in refusing the Plaintiff's Request for Decree, which request and answer are as follows, viz:

"That the Thomas Colliery Company, its agents and employees, be and is hereby perpetually restrained from mining or removing any coal from the Mammoth vein top or bottom split and from the Skidmore, Seven Foot and Buck Mountain veins in the Kehley's Run Mine, within the area bounded southwardly by the line between the lines of the Girard Estate and the Philadelphia and Reading Coal and Iron Company, eastwardly by a vertical plane passing a line extending northwardly from a point in the line between the Girard Estate and the Philadelphia and Reading Coal and Iron Company five hundred and ten (510) feet eastwardly from the intersection of said line and the extension of the eastern line of the Home Brewing Co. lot; northwardly

by the outcrop of the bottom slate of the Little Buck Mountain vein and eastwardly by a vertical plane passing through a line extending northwardly from a point in the line between the Girard Estate and the Philadelphia and Reading Coal and Iron Company five hundred (500) feet westwardly from the intersection of said line and the extension of the western line of the Home Brewing Company lot.'

We decline to enter the decree as requested.

This exception is overruled and dismissed. The threatened danger, if any, was not from the lower veins, and under the evidence and findings, there was no warrant or justification for such decree. Under the evidence, it was most unlikely that the mining out of the lower veins could ever affect the surface.

Plaintiff's Exception No. 25.

"The Court erred in its decree entered December 11th, 1916, in so far as it permits Defendant to mine:

'1. Any coal in the Little Buck, Big Buck and Seven Foot Veins within an area lying two hundred (200) feet east of the brewery line and four hundred (400) feet west of the brewery line.'

This exception is overruled and dismissed. Conceding for the purpose of argument that the plaintiff is entitled to an injunction restraining the defendant from mining in the Mammoth and Skidmore Veins, the reasons therefor are greatly weakened when considered with reference to these lower veins. The danger to the surface from mining out these veins is so remote and speculation under the evidence and findings of the Court, that restraining operation there would be inequitable, unjust and oppressive.

DEFENDANT'S EXCEPTIONS

Defendant's Exception No. 1.

"The Court erred in overruling defendant's objection to the admission of testimony offered by the plaintiff, which offer, objection, and ruling are, as follows:

TESTIMONY, page 12.

CHRISTIAN SCHMIDT, called by the plaintiff, sworn.

Mr. Kaercher.— We ask for an offer.

Mr. Smith.— Plaintiff proposes to prove by the witness on the stand that he is the President and Manager of the Home Brewing Company, the plaintiff in the case; that the Home Brewing Company has been in possession of lots 2, 3, 4 and 5 of block 12 in Shenandoah for 14 years or longer; that the plaintiff has erected upon said lot a large brick brewery or plant, consisting of a brewery, engine houses, engine rooms, ice plant, ammonia compression plant and other buildings and appliances used in the manufacture or storage of beer. To be followed by evidence showing the effect upon the surface of the ground in the immediate proximity to the property of the Home Brewing Company produced by the mining on the tract of land upon which the defendants are now engaged in operating; and for the purpose of showing that any subsidence of the ground would affect the buildings erected thereon, the piping system containing the ammonia, and the piping system of the refrigerator plant, which is under high pressure, and endanger the lives of the employees by breaking and interfering with that system.

Mr. Farquhar.— Counsel for the Thomas Colliery Company defendant, objects to the offer in general, and particularly to all testimony relating to the effect of depriving the plant of lateral support as affecting the building, the cold storage plant, or as affecting the employees therein; that under the pleadings, the bill, and amended bill filed the lateral support does not extend to buildings, persons in the buildings or to any contrivances or constructions that they have placed upon the surface. Their right as an adjoining owner claiming lateral support extends to the surface only and nothing more.

The Court.— Our recollection is that it would be limited to the matter of support that is to the surface, limited to the threatened disturbance of the surface. We will permit them at this time to show what effect it will have on the buildings which would necessarily result from the surface

being affected. This is not a question of damages for injury done to the buildings.

Mr. Kaercher.— We base our objection on the ground that the evidence as to any possible injury to the buildings or employees therein is irrelevant and incompetent for any purpose because the plaintiff in this case, even though they would show that our operation has so cracked their buildings or disturbed them in any way, could not recover one cent of damages. Therefore the evidence proposed to be elicited must surely be incompetent, irrelevant and inadmissible to sustain their right under the bill as filed.

The Court.— For a claim of damage it might possibly be, but for a claim for protection to the surface, limiting this for the sake of argument to the surface, we permit the evidence and overrule your objection.

Defendant excepts. Bill sealed.

TESTIMONY, page 15.

‘Q. Tell us what buildings and what kind of buildings, what is the nature of them and the purpose.’

Mr. Kaercher.— We renew the objection that it is incompetent, irrelevant and immaterial under the pleadings in this case and cite the case of Matulis vs. Philadelphia & Reading Coal & Iron Company, 201 Pennsylvania 70, and McGettigan vs. Fox, 149 Pennsylvania, 155, also Weller vs. Davis, 245 Pennsylvania, 280. There is no averment in the amended bill that the defendant is mining without care or has shown any negligence in mining whatsoever. Therefore, under the pleadings, we contend that all testimony relating to the buildings or structures thereon is incompetent, irrelevant and inadmissible for any purpose.

The Court.— The case may hinge on that very proposition, but for the present we overrule your objection and permit the testimony and will dispose of it afterwards.

Defendant excepts. Bill sealed.”

This exception is sustained, for the reason that under the pleadings the only claim of the plaintiff is for a violation of its right to lateral support. No other right of plaintiff's

is claimed to have been invaded; and if the plaintiff's right to lateral support is restricted to the surface in its natural condition, then equity could not restrain for more than a violation of this right. The evidence as to the buildings and improvements on plaintiff's land was therefore immaterial and irrelevant, and the conclusion of the Court shows that possible injury to the buildings and employees by reason of the special use of the buildings, was considered in granting the injunction.

Defendant's Exception No. 5.

"The Court erred in answer to the Plaintiff's Fourth Request for findings of fact, which request and answer are, as follows:

4. That the mining and removal of coal by the defendant from the Kehley's Run mine prior to January 9th, 1916, has caused the subsidence of the ground on which is erected the plaintiff's brewery, thereby throwing the machinery in said brewery out of alignment, threatening the destruction of said machinery and endangering the lives of the workmen in said brewery.

Answer.— We affirm this as requested except the part as to "throwing the machinery in said brewery out of alignment," which is somewhat doubtful."

Answer.— We affirm this as requested except the part as to "throwing the machinery in said brewery out of alignment," which is somewhat doubtful."

This exception is overruled and dismissed. As in the case of the preceding two Exceptions it must be read in connection with the Court's finding that the cause of the subsidence was mining prior to 1904 and by the predecessor of the defendant.

Defendant's Exception No. 6.

"The Court erred in answer to Defendant's Eighth Request for findings of fact, which request and answer are, as follows:

8. That if the present preliminary injunction be made permanent, the life of defendant's operation will be limited

to about three years from this date, whereas if defendant is permitted to mine the coal in the enjoined area, the life of its operation will be extended to from seven to ten years.

Answer.— We decline to find the facts as requested. There are too many contingencies involved, and I am not a prophet."

This exception is overruled and dismissed. The Court could decline to adopt the view of experts if their conclusion was not convincing, and the effect of the injunction would necessarily depend upon contingencies. The time of the operation of the mine will undoubtedly be extended by lifting the injunction, but to what extent is uncertain.

Defendant's Exception No. 7.

"The Court erred in answer to Defendant's Ninth Request for findings of fact, which request and answer are, as follows:

9. That the continuance of the present injunction will result in permanently preventing the defendant from mining of 450,000 tons of coal.

Answer.— We decline to affirm the facts as requested. There are too many contingencies involved, and I am not a prophet."

This exception is overruled and dismissed. The quantity of coal involved was pretty well established by the evidence, unless not believed by the Court. The Court, however, was not bound to accept this evidence as true.

Defendant's Exception No. 8.

"The Court erred in answer to Defendant's Eleventh Request for findings of fact, which request and answer are, as follows:

11. That the bed rock under the plaintiff's lots is found at from twelve (12) feet to fifteen (15) feet below the surface, and there is no evidence in this case that there has been an subsidence of the surface of the plaintiff's lots due to the defendant's mining operations.

This exception is overruled and dismissed. There was evidence of such subsidence due to the mining operations

of the defendant or its predecessors in title. The Court could therefore decline this request for finding of fact.

Defendant's Exception No. 9.

"The Court erred in answer to Defendant's Twelfth Request for findings of fact, which request and answer are, as follows:

12. That the only substantial injury which plaintiff has attempted to show will result from defendant's mining is the possibility of injury to its brewery buildings or to its machinery and employees.

Answer.— We decline to affirm this, but say, that the testimony of plaintiff and defendant, as well as my personal observation (obtained by viewing the premises at request of both parties), shows that substantial injury has been done by defendant's mining to other property within the restrained area, and that injury may result to persons, as well as property of the public, within a large adjacent area; in which case it is our duty as Chancellor to take judicial notice, especially when it involves the safety of life and property of the public in a thickly settled locality. In injunction cases such as the present, the chancellor does not try the matter merely as one arising between two private litigants; he considers the general interest of the public."

This exception is sustained. The fact involved in this Request was clearly established by the evidence. It was a true statement of the plaintiff's showing of the effect of future mining. The evidence did not indicate any danger to the general public, and owners of private property in the vicinity have their redress if they suffer injury at the hands of the defendant. The soundness of the reason of the Chancellor for the refusal of the request, as having any bearing upon the disposition of this case, is doubted.

Defendant's Exception No. 10.

The Court erred in answer to Defendant's Thirteenth request for findings of fact, which request and answer are, as follows:—

13. That there is no evidence in this case that the min-

ing operations of defendant will cause any appreciable damage of plaintiff's lots apart from the buildings, improvements or equipment thereon, and that there is no evidence that such mining will cause irreparable damage to said lots.

Answer.— We decline to affirm this request for finding of fact.”

This exception is sustained. This Request for Finding of Fact should have been affirmed. The effect of future mining, under the evidence and findings of the Court, was uncertain and the injury suffered by the surface of plaintiff's property up to this time could certainly be compensated in damages so there was nothing in the case to indicate with any degree of certainty, that the plaintiff would suffer irreparable damage by a continuance of the mining operations of the defendant.

Defendant's Exception No. 11.

“The Court erred in answer to Defendant's Fourteenth Request for findings of fact, which request and answer are, as follows:

14. That any injury to plaintiff's lots, considered in its natural state, and without regard to the buildings, machinery or equipment thereon or therein, which might be caused, under any view of the testimony, from defendant's operations, may readily be repaired at moderate cost by filling in or by other similar process.

Answer.— We decline to affirm this request for finding of fact.”

This exception is sustained. The request should have been affirmed. No injury was done that could not be compensated in damages.

Defendant's Exception No. 12.

“The Court erred in answer to Defendant's Fifteenth Request for findings of fact, which request and answer are, as follows:

15. That defendant company has such financial standing as will guarantee the plaintiff from any loss or damage to plaintiff's lots which may result from defendant's mining

operations.

Answer.— We decline to affirm the finding of fact as we are not informed by testimony or otherwise; moreover, the financial standing of parties is always fluctuating.”

This exception is overruled and dismissed. We think the request was properly refused for the reasons stated. Moreover, the financial standing is not the determining factor in considering adequacy of legal remedy.

Defendant's Exception No. 13.

“The Court erred in answer to Defendant's Sixteenth Request for findings of fact, which request and answer are, as follows:

16. That no damage whatever to the surface of plaintiff's lots or to any buildings, machinery, equipment or employees thereon or therein, will be caused by defendant's mining out all the coal described in defendant's mining lease, and situate north of the plaintiff's lots.

Answer.— We decline to affirm this as it is stated, but say that no damage whatever to the surface of plaintiff's lots or to any buildings, machinery, equipment or employees thereon or therein will be caused by defendant's mining out of the coal in the vein known as the Little Buck Mountain Vein on the land described in defendant's mining lease, and situate north of the plaintiff's lots, provided they mine and take out only so much of the coal as may be safely taken out by proper and secure methods, such as leaving sufficient pillars for support of the top or overlying measures during (what is commonly known as) first mining, and in the second or final mining (commonly known as robbing backwards) beginning at the point where robbing commences by taking out so much of the remaining coal in such manner as to cause the immediate or overlying measure to fall and fill the entire space with the debris or gob of the contiguous top strata, so as to furnish sufficient support and firm basis or foundation for the subjacent stratas of the next overlying vein, stratas or surface, up to or beyond the area of danger or point of threatened danger.”

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This exception is overruled and dismissed. The fact involved in this exception rested in the opinions of experts engineers and miners and these opinions differed. Under this evidence the Court could adopt the opinion believed. It was not bound to believe the witnesses for the defendant. This request asked the Court to adopt the view of the defense and the exception would bind the Court to that view. This position is not tenable. The Court could hardly say as a fact that mining out all the coal might not damage the surface. Results might well depend upon methods of mining.

Defendant's Exception No. 14.

"The Court erred in answer to Defendant's Seventeenth Request for findings of fact, which request and answer are as follows:

17. That no damage whatever to the surface of Plaintiff's lots or to any buildings, machinery, equipment or employees thereon or therein, will be caused by defendant's mining out all of the coal in the vein known as the Buck Mountain Vein on the land described in defendant's mine lease and situate north of the plaintiff's lots.

Answer.— We decline to affirm this for the same reasons as stated in No. 16, *mutatis, mutandis*."

This exception is overruled and dismissed, for the reasons assigned in disposing of the 13th Exception. The Court was not bound to adopt this view of the effect of future mining in this vein.

Defendant's Exception No. 15.

"The Court erred in answer to Defendant's Eighteenth Request for findings of fact, which request and answer are as follows:

18. That no damage whatever to the surface of plaintiff's lots or to any buildings, machinery, equipment or employees thereon or therein, will be caused by defendant's mining out all of the coal in the vein known as the Seven Foot Vein on the land described in defendant's mine lease and situate north of the plaintiff's lots.

Answer.— We decline to affirm this for the same reasons as stated in No. 16, *mutatis, mutandis*.”

This exception is overruled and dismissed, for the reasons assigned in disposing of Exceptions 13 and 14.

Defendant's Exception No. 16.

“The Court erred in answer to Defendant's Nineteenth Request for findings of fact, which request and answer are, as follows:

19. That no damage whatever to the surface of plaintiff's lots or to any buildings, machinery, equipment or employees thereon or therein, will be caused by defendant's mining out all the coal in the vein known as the Skidmore Vein, north of a plane passing through the south surface line of the lands of the Girard Estate leased to defendant, north of plaintiff's lot and projected downward toward the north at an angle of 70 degrees with the surface to the bottom slate of the Skidmore Vein, such plane extending east and west for a distance of 50 feet beyond the projection of the east and west line of plaintiff's lots.

Answer.— We decline to affirm this as it is stated, and refer to the reasons given in answer to the sixteenth request for findings of fact (*mutatis mutandis*) with the additional reason that the strata at this point between the Skidmore and Mammoth Veins being only 30 feet, with the pitch of the vein only 20 degrees, and the distance to the outcrop of said vein being much less than the distance between the underlying veins, the volume bulk or quantity of the immediate top or overlying measures of the vein at this point might not supply sufficient fall of rock, debris or gob to furnish safe support or foundation for the subjacent strata of the Mammoth vein and the overlying strata to the surface at or near the northern line of the brewery property.”

This exception is overruled and dismissed. The Court cannot say under the conflicting opinions of experts that the surface may not be damaged by mining out all the coal in the Skidmore Vein. Under the theory of the “angle of

break" it would seem unlikely that damage should occur within these limits, but the Court could not be compelled to say that in any event it will not occur.

Defendant's Exception No. 17.

"The Court erred in answer to Defendant's Twentieth Request for findings of fact, which request and answer are as follows:

20. That no damage whatever to the surface of plaintiff's lots or to any buildings, machinery, equipment or employees thereon or therein, will be caused by defendant's mining out all the coal in the vein known as the Mammoth Vein, north of a plane passing through the south surface line of the lands of the Girard Estate leased to defendant north of plaintiff's lot and projected downward toward the north at an angle of 70 degrees with the surface to the bottom slate of the skidmore Vein, such plane extending east and west for a distance of 50 feet beyond the projection of the east and west lines of plaintiff's lots.

Answer.— We decline to affirm this request for the same reasons as stated in Nos. 16 and 19, *mutatis, mutandis*."

This exception is overruled and dismissed for the reason assigned in disposing of the 16th Exception.

Defendant's Exception No. 18.

"The Court erred in answer to Defendant's Twenty-second Request for findings of fact, which request and answer are, as follows:

22. That irreparable injury to the plaintiff's lots in their natural state will not result from the defendant's mining operations.

Answer.— We decline to affirm this finding of fact."

This exception is sustained. This request was rather a conclusion of law than a finding of fact. There was no evidence to indicate that irreparable injury will result from mining according to approved modern methods, and the Chancellor found that the prospective mining operations of the defendant were in accordance with such methods.

Defendant's Exception No. 19.

"The Court erred in answer to Defendant's Twenty-third Request for findings of fact, which request and answer are, as follows:

23. That the possibility of irreparable injury to plaintiff's improvements, by reason of defendant's mining operations, is remote, doubtful, contingent and speculative.

Answer.— We decline to affirm this finding of fact.

This exception is sustained. It also appears to be a conclusion of law and the evidence, as well as the findings of the Chancellor, indicate that the injury which the plaintiff might suffer by reason of the prospective operations of the defendant, is remote, doubtful, contingent and speculative.

Defendant's Exception No. 20.

"The Court erred in answer to Defendant's Twenty-sixth Request for findings of fact, which request and answer are, as follows:

26. That any insecurity of the surface of the plaintiff's lots due to mining operations north thereof is not occasioned by any mining operations of the defendant, Thomas Colliery Company.

Answer.— We decline to affirm this request for finding of fact."

This exception is overruled and dismissed. There was evidence to warrant the conclusion that the condition of the surface was due to the operation of the defendant or its predecessor. Under the evidence, the Court was not bound to adopt the view indicated by this request.

Defendant's Exception No. 21.

"The Court erred in answer to Defendant's Twenty-seventh request for findings of fact, which request and answer are, as follows:

27. That any insecurity to the surface of plaintiff's lots caused by mining operations north thereof can be relieved only by the withdrawal of the pillars in the Mammoth Vein, as described by defendant's witnesses.

Answer.— We decline to affirm this as it is stated but say it is a doubtful question.

That the surface of plaintiff's lots is or has been insecure is manifest, as shown by the cracks, fissures and openings in the buildings and ground near and on which the buildings are erected, to such an extent as to throw the buildings of the plaintiff and other buildings close thereto, out of plumb; all of which is undoubtedly due to some disturbance of the underlying or adjacent support.

While it is undisputed that the primary cause of this disturbance was due to improper mining, by removing too much coal from pillars No. in the west gangway of the Mammoth vein before 1904, when the original injunction was issued, yet both parties differ as to the remedy.

The defendant claims that the pillars remaining being too weak to sustain the solid, overlying strata, including the coal in the Mammoth vein, thereby causing a general subsidence in the entire area under, at and near the brewery property, that the condition will be aggravated from time to time, by maintaining the status quo; and that therefore the only remedy is to relieve these pillars from this great overlying weight as contended for in their 19th and 20th requests for findings of facts, insisting that by properly mining the coal up to the lines designated in said request for finding of facts the immediate overlying strata up to the outcrop of the vein, would fall down the pitch of the vein and fill in not only the space now occupied by the remaining coal in that area, but also the space formerly occupied by the coal that has already been mined, as well as the vacant space created by the falling of all the overlying strata within the area of the danger point, and thus secure the safety of the surface and all buildings erected thereon.

On the other hand, however, the plaintiff claims and all their witnesses testify, that to permit any more mining of coal of any kind, or in any manner within the area of the preliminary injunction, would increase the danger and make more insecure the surface of the plaintiff's lots and the

buildings and improvements erected thereon; and therefore insist upon preserving the status quo as the only remedy for the safety of their property.

That the petition of the plaintiff, that their claim "is the only remedy for the safety of their property," is not necessarily correct, is shown by the fact that since the issuing of the preliminary injunction by Judge Marr in 1904, and the extension of the area of that injunction by Judge Shay in 1911, new cracks fissures and subsidence of the surface and buildings of the plaintiff have occurred from time to time, and aggravated and increased the insecurity to the surface and buildings of the plaintiff, which shows that the rotting of timbers, with the chipping of the pillars through pressure and atmospheric effect, will make the condition grow worse if the injunction remains as it is."

This exception is overruled and dismissed. There was evidence to warrant a finding contrary to that expressed in this request and so it cannot be said that the refusal of the request was erroneous.

Defendant's Exception No. 22.

"The Court erred in answer to the Plaintiff's First Request for conclusions of law, which request and answer are, as follows:

1. That the right of the plaintiff to lateral support for its land, from the land included in the Kehley's Run mining operations, and owned by the City of Philadelphia, Trustee under the will of Stephen Girard, deceased, is a natural and absolute right.

Answer.— We affirm this request for conclusions of law."

This exception is overruled and dismissed. The conclusion seems to be a correct statement of the law.

Defendant's Exception No. 23.

The Court erred in answer to the Plaintiff's Second Request for conclusions of law, which request and answer are, as follows:

2. That the plaintiff should perpetually be restrained

from mining or removing any coal from the Kehley's Run mine that will deprive the plaintiff of the right of lateral support for its land or may impair said right.

Answer.— We affirm this request for conclusion of law.

This exception is sustained. Equity will only interfere where an injury is irreparable and the legal remedy inadequate.

Defendant's Exception No. 24.

"The Court erred in answer to the Defendant's First Request for conclusion of law, which request and answer are, as follows:

1. That defendant's operations, being conducted entirely on property leased by it from the owner thereof and being carried on with the approval of such owner, are not to be interfered with by a Court of Equity at the suit of an adjoining owner, unless it appear to the satisfaction of the Chancellor.

(a) That an injury to property of the plaintiff will clearly result therefrom.

(b) That the proximate cause of such injury will be a wrongful act of the defendant.

(c) That such injury will be definite and immediate, and not merely indefinite, speculative, contingent, uncertain or doubtful.

(d) That such injury will, should it arise, give rise to a valid claim at law against defendant for the damage caused thereby.

(e) That for such injury, the plaintiff's remedy at law is inadequate and incapable of adjustment by the payment of a monetary consideration.

Answer.— We decline to affirm this request for conclusion of law as the case at bar is not an action for damages, and the bill does not pray for an assessment of damages; that it is founded upon a tort, the invasion of an absolute, natural right that belonged to the plaintiff and it is assimilated rather to an action for a nuisance, in which it is not necessary to prove negligence on the part of the

defendant, than to an action on a contract for damages.

As to the contention that equity cannot interfere unless it appears to the satisfaction of the Chancellor:

(a) That an injury to property of the plaintiff will clearly result.

The answer is that injury has clearly resulted to the plaintiff.

(b) That the proximate cause of such injury will be a wrongful act of the defendant.

The answer to that is that the evidence on the part of the plaintiff's and defendant's witnesses is that the cracks in the ground are the result of the mining operations in the Kehley Run Colliery.

(c) That such injury will be definite and immediate, and not merely indefinite, speculative, contingent, uncertain or doubtful.

The answer to that is that the injury is present and actual, and because the amount thereof is not definitely fixed and cannot be definitely fixed is the very reason why equity has jurisdiction.

(d) That such injury will, should it arise, give rise to a valid claim at law against defendant for damages caused thereby.

The answer to that is that the injury may be the basis of an action for damages, but that does not prevent the continuance of the injury, and for that reason equity has jurisdiction.

(e) That for such injury the plaintiff's remedy at law is inadequate and incapable of adjustment by the payment of a monetary consideration.

Reply to this is covered in answer to "c."

This exception is sustained. The conclusion of law embodied in this request should have been adopted. It was a correct statement of the limitations of equity jurisdiction in this case.

In answering the first proposition (a), the learned Chancellor fails to differentiate between first mining which is

finished and which caused the injury to plaintiff's land, and second and third or final mining which is in prospect and which the evidence and the Chancellor's findings indicate, is to be done according to approved modern methods.

The answer to the second proposition (b), is also based upon past mining. The only mining now contemplated is second or third or final mining, the effect of which is speculative.

The answer to the third proposition (c), is based upon the same erroneous assumption.

The answer to the fourth proposition (d), assumes that the injury to the surface of the plaintiff's land is bound to continue.

In answering the fifth proposition (e), sight is lost of the fact that the effect of future mining is uncertain and the extent of the injury at this time would seem to be capable of ascertainment and adjustment at law in money damages.

Defendant's Exception No. 25.

The Court erred in answer to the Defendant's Second Request for conclusion of law, which request and answer are, as follows:

2. That the right of the defendant to mine and remove without negligence, all of its coal is not limited by any obligation on its part to afford lateral support to the plaintiff's buildings and improvements.

Answer.— We decline to affirm this request for conclusion of law as negligence is alleged and established by testimony of both parties. Moreover, the request is answered by *Sullivan vs. Jones and Loughlin*, 208 Pa. 540, and *Vautier vs. Atlantic Refining Co.*, 231 Pa. 8.

This exception is sustained. The requested conclusion was a correct proposition of law.

Defendant's Exception No. 26.

"The Court erred in answer to the Defendant's Third Request for conclusion of law, which request and answer are, as follows:

3. That the Thomas Colliery Company has the right to

the natural, proper and profitable use of its mining rights, and any possible injury to plaintiff's lots, buildings, improvements, equipment or employees caused by the removal of its coal by defendant in conducting its mining operations on its own land, without negligence, would be *damnum absque injuria*.

Answer.— We decline to affirm this request for conclusions of law for the same reason stated as to No. 2."

This exception is overruled and dismissed. The conclusion requested would be correct if it did not extend to the surface of the land, and possibly should include liability for malicious injury.

Defendant's Exception No. 27.

"The Court erred in answer to Defendant's Fourth Request for conclusion of law, which request and answer are, as follows:

44. That the right to lateral support if enforceable against the defendant is limited to the land in its natural condition and does not extend to or include plaintiff's buildings, improvements or the persons thereon or therein in the absence of proof of negligence or carelessness on the part of defendant in conducting its mining operations.

Answer.— We decline to affirm this request for conclusion of law as the decisions of many courts show that the right of lateral support extends to the land in its natural state, but it does not follow that because buildings are erected upon the land the owner is deprived of the right of lateral support, particularly when, as it is shown in this case, the presence of buildings does not add or contribute to the subsidence (Dodge, page 138 and other witnesses who testified that the cause was from below and not from weight above the surface), and also the result of negligent mining."

This exception is sustained. The requested conclusion is a correct statement of law, which might be more accurate if it included malicious injury. The answer to this request does not correctly state the fact. While there is no evidence of the weight of the material excavated for the brewery,

the evidence does show that four and five story buildings of brick and iron, with engines, machinery, etc. have been erected upon the plaintiff's lots, and plaintiff's own witness (page 138, Notes of Testimony) testified that the improvements increased the weight upon the land. Besides there was nothing to indicate that the proposed taking out of the pillars would be negligently done.

Defendant's Exception No. 28.

"The Court erred in answer to Defendant's Fifth Request for conclusions of law, which request and answer are, as follows:

5. That the negligence or carelessness which must be averred and proved by the plaintiff in order to sustain a claim of right to lateral support to buildings or improvements, must be affirmative negligence in the manner of conducting the mining operations, and such negligence cannot be predicated on the mere act of leaving the plaintiff's lots without lateral support or on the removal of all the coal from defendant's property in accordance with approved methods of modern mining.

Answer.— We decline to affirm this request for conclusion of law. The question as to approved methods of modern mining is involved and disputed. Moreover, see *Vautier vs. Atlantic Refining Co.*, 231 Pa., 8."

This exception is sustained. The conclusion requested seems to be a correct statement of law, under the authorities.

Defendant's Exception No. 29.

"The Court erred in answer to Defendant's Seventh Request for conclusions of law, which request and answer are, as follows:

7. That for the purpose of this case the plaintiff's property must be regarded as though in its natural state without buildings, improvements, equipment or persons whatever thereon or therein.

Answer.— We decline to affirm this request for conclusion of law, as it is too broadly stated, and not in conformity with the facts."

This exception is sustained. The pleadings contained no allegation of negligence and we are therefore confined to the land in its natural condition, and even though alleged in the bill, there is nothing in the evidence to indicate that the future mining is to be conducted negligently or maliciously, but on the contrary the Chancellor has found that the proposed final mining by the defendant is according to approved modern methods.

Defendant's Exception No. 30.

"The Court erred in answer to Defendant's Tenth Request, for conclusion of law, which request and answer are, as follows:

10. That the averment that defendant's mining operations will cause injury to plaintiff's property has not been established with such certainty that a Court of Equity would be justified, under all the circumstances in enjoining such mining.

Answer.— We decline to affirm this request for conclusion of law, as all the testimony shown (and it is not disputed) that injury has already been caused and further injury threatening."

This exception is sustained. The conclusion should have been adopted. The reason of the Answer fails to distinguish between first mining which caused the injury apparent now, and second and third mining which is in contemplation and the effect of which is speculative and uncertain.

Defendant's Exception No. 31.

"The Court erred in answer to Defendant's Eleventh Request for conclusion of law, which request and answer are, as follows:

That it has not been shown that any injury that may occur to plaintiff's lots in their natural condition by reason of mining on any part of the tract leased by defendant would be irreparable and incapable of proper adjustment by an action for damages at law, and therefore the bill must be dismissed.

Answer.— We decline to affirm this request for con-

clusion of law, as acts of defendant that have injured and may continue to injure plaintiff's property, are a tort and give defendant no right to injure or threaten to injure his property."

This exception is sustained. The request should have been adopted as a conclusion of law.

Defendant's Exception No. 32.

"The Court erred in answer to Defendant's Twelfth Request for conclusion of law, which request and answer are, as follows:

12. That under the pleadings and all the evidence in the case the bill must be dismissed at the cost of the plaintiff and the injunction heretofore granted dissolved.

Answer.— We decline to affirm this request for conclusion of law, not only on the grounds stated in request, but to affirm it would be to repudiate the defendant's own offer to leave a certain amount of coal remain in its natural condition within the restrained area."

This exception is sustained in part, except the portion thereof disposing of the costs. In view of the preliminary injunction granted by this Court and the divergent opinions of the mining engineers upon the surface effect of the different methods of mining, and especially the possible effect of any further mining in the enjoined territory; and the further fact that some damage has been done to the surface of plaintiff's land, it seems only equitable that the costs of this proceeding should be borne by the respective parties, and the Court will now so decree in the final order

Defendant's Exception No. 33.

"The Court erred in making a Decree, as follows:

DECREE

Now, December 11th, 1916, the Court orders, directs and decrees that the final, preliminary injunction issued by His Honor Judge Shay, on the 24th of July 1911, be modified so as to allow the defendant to carefully mine out all the coal in the Little Buck, Big Buck and Seven Foot Veins in the restrained area, by strictly and faithfully following

the method of ming known as the slushing and gob system, so that all cavities are closely filled up and choked as each pillar is robbed back, and no large areas permitted to be left unprotected at any one time, whereby the entire overlying strata will be maintained intact to the surface.

In the Skidmore Vein they shall be permitted to mine in the same proper and careful manner, all the coal on the east from the eastern line of the preliminary injunction extending north and south, westward to Two Hundred (200) feet east of the eastern line of the brewery property, and on the west from the western line of the preliminary injunction extending north and south up to Four hundred (400) feet west of the western line of the brewery property.

In the top and bottom split of the Mammoth Veins, they shall be permitted to mine in the same proper and careful manner, all the coal on the east from the eastern line of the preliminary injunction extending north and south, Westward to Two hundred (200) feet east of the eastern line of the brewery property, and on the west from the western line of the preliminary injunction extending north and south, up to Four hundred (400) feet west of the western line of the brewery property.

It is further ordered, directed and decreed, that all the coal in the top and bottom split of the Mammoth and Skidmore Veins within the restrained area lying Two hundred (200) feet east of the brewery line and Four hundred (400) feet west of the brewery line, shall not be mined, but shall perpetually remain intact and undisturbed, as ordered and decreed in the preliminary injunction.

It is further ordered, directed and decreed, that if there is any sign of subsidence, disturbance, cracking or crushing of any of the overlying stratas in any part of the workings of any of the veins, at any time, all mining shall cease until further order of Court.

It is further ordered, directed and decreed that the defendant shall at all times cheerfully and faithfully report the progress and condition of such mining to the plaintiff,

whenever plaintiff shall request any such information; and defendant shall permit the plaintiff to have access to all the maps and drawings of such mining, and shall allow the plaintiff or its agents, at all times, upon proper request, to enter all parts of their mines to make examinations of the progress and condition of such mining. In case they should refuse to do so, all mining within this area shall cease until further orders of Court.

It is further ordered, directed and decreed that all taxable costs shall be paid by the defendant. This order and decree to become the final order and decree of the Court, unless exceptions be filed thereto within the time prescribed by the rules of the Supreme Court. The Prothonotary shall notify counsel for both plaintiff and defendant of the entering of this decree.

C. N. BRUMM, A. L. J."

This exception is sustained. Under the exceptions sustained, such decree could not be entered. It is altogether at variance with the conclusions reached in disposing of these Exceptions.

Defendant's Exception No. 34.

The Court erred in making a decree, modifying on 20 December 1916, the Decree made 11 December 1916, which Decree, as modified and filed is, as follows:

D E C R E E

Now, December 11th, 1916, the Court orders, directs and decrees:

1st. That the final, preliminary injunction issued by his Honor Judge Shay, on the 24th of July, 1911, be modified so as to allow the defendant to carefully mine out all the coal in the Little Buck, Big Buck and Seven Foot Veins in the restrained area, in the following manner, to wit:

(a) While engaged in (what is known as) first mining, defendant shall leave as many retaining pillars, wide enough and strong enough as may be necessary at all times, and at all points, to support and firmly hold in place all of the top and overlying strata or formation.

(b). While engaged in (what is known as) second and final mining, defendant shall strictly and faithfully follow the method used in what is known as the fall and fill-in or slush and gob system. During this final robbing back process, the defendant shall mine so that all cavities and vacant spaces will be closely filled up and choked with fallen rock and other matter as each pillar is mined and robbed back, leaving no large area of the immediate overlying top unsupported at any time, so that the entire upper strata shall be maintained intact, firm and solid up to and including the surface.

(c) In the Skidmore Vein they shall be permitted to mine in the same proper and careful manner, all the coal on the east from the eastern line of the preliminary injunction extending north and south, Westward to Two hundred (200) feet east of the eastern line of the brewery property, and on the west from the western line of the preliminary injunction extending north and south, up to Four hundred (400) feet west of the western line of the brewery property.

(d). In the top and bottom split of the Mammoth Veins; they shall be permitted to mine in the same proper and careful manner, all the coal on the east from the eastern line of the preliminary injunction extending north and south, Westward to Two hundred (200) feet east of the eastern line of the brewery property and on the west from the western line of the preliminary injunction extending north and south, up to Four hundred (400) feet west of the western line of the brewery property.

2nd. It is further ordered, directed and decreed, that all the coal in the top and bottom split of the Mammoth and Skidmore veins within the restrained area lying Two Hundred (200) feet east of the brewery line and Four Hundred (400) feet west of the brewery line, shall not be mined, but shall perpetually remain intact, undisturbed, as ordered and decreed in the preliminary injunction.

3rd. It is further ordered, directed and decreed, that if there is any sign of subsidence, disturbance, cracking or

crushing of any of the overlying stratas in any part of the workings of any of the veins, at any time, all mining shall cease until further order of Court.

4th. It is further ordered, directed and decreed, that the defendant shall at all times cheerfully and faithfully report the progress and condition of such mining to the plaintiff, whenever plaintiff shall request any such information; and defendant shall permit the plaintiff to have access to all the maps and drawings of such mining, and shall allow the plaintiff or its agents, at all times, upon proper request, to enter all parts of their mines to make examinations of the progress and condition of such mining. In case they should refuse to do, all mining within this area shall cease until further orders of Court.

5th. It is further ordered, directed and decreed, that all taxable costs shall be paid by the defendant. This order and decree to become the final order and decree of the Court, unless exceptions be filed thereto within the time prescribed by the rules of the Supreme Court. The prothonotary shall notify Counsel for both plaintiff and defendant of the entering of this decree.

C. N. BRUMM, A. L. J."

This exception is sustained, for the reason set forth in disposing of the preceding exception.

And now, to wit, February 8, 1921, it is further ordered, adjudged and decreed that the bill of the plaintiff be dismissed, without prejudice to the right of the plaintiff to apply for relief in equity if the mining operations of the defendant should cause or threaten to cause irreparable injury to the surface of its land; that each of the parties to this suit pay its costs. The Prothonotary is hereby directed to notify the plaintiff and the defendant of the filing of this Opinion and the entering of this final Decree.

Wilhelm's Case.

Attorney-at-law — Disbarment — Appropriation of client's money — Inciting feeling against court in public address — Statute of limitations — Laches — Continuance — Discretion of court — Privileged communication — Reinstatement — Appeal — Review.

An attorney-at-law may be disbarred where it appears that he retained and used money which he had collected for a client, and refused to return it when demand was made upon him. The fact that the money was paid back before the rule for disbarment was acted upon, does not wipe out the offense.

The fact that a rule for disbarment is allowed to rest for five years, and the attorney suffered to continue his practice, is not ground for reversing the final action of the court in making the rule absolute.

The statute of limitations has no application to such a case, nor does the delay amount to laches.

An attorney-at-law, who, in a public address, incites popular feeling against the judges for the purpose of interfering with a fair and impartial consideration of a pending case, may be disbarred.

An improper attempt to influence judicial action is never privileged.

An attorney is an officer of the court, and when his conduct is in question, it is proper for a judge to interrogate witnesses.

The matter of continuance is for the discretion of the trial court, and its refusal is not cause for reversal.

The court has the undoubted right, in the exercise of a sound discretion, to disbar an attorney for serious misconduct in court or out of court, and such right should be firmly exercised, but with great caution and only in a clear case.

The court has discretionary power to reinstate an attorney after disbarment.

Supreme Court.

Appeals, Nos. 109 and 110, Jan. T., 1921, by William Wilhelm, from orders of C. P. Schuylkill Co., May T., 1920, Nos. 313 and 381, making absolute rules to disbar in case of William Wilhelm, an attorney. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

The court in an opinion by BERGER, J., made the rules

absolute. Respondent appealed.

Paul J. Sherwood, for appellant.— A member of the bar has a property in his profession: *In re Davies*, 93 Pa. 116.

The rule to disbar must be "impartially considered" and "prudently exercised:" *In re Davies*, 93 Pa. 116; *In re Graffius*, 241 Pa. 222; *Austin's Case*, 5 Rawle 191.

J. W. Moyer, Jno. F. Whalen, J. A. Noecker, T. H. B. Lyon and A. L. Shay, for appellee.

WALLING, J., February 21, 1921.

These two appeals are from orders of disbarment of the same attorney. William Wilhelm, the respondent, has been a resident member of the Schuylkill County Bar in practice since 1881. In 1909 he became counsel for plaintiff in the personal injury case of William Snyder, guardian of Mary Rymovich v. Schuylkill Traction Company; which resulted in a verdict and judgment for plaintiff of \$3,000, and was affirmed by this court. During the years 1911 and 1912, respondent, as such counsel, received on account of said judgment various sums, aggregating \$1,575. This left in his hands, after deducting counsel fees and two small payments made plaintiff, practically \$1,100 of the client's money. This the latter sought to obtain by repeated interviews with respondent, but was put off on the assertion that the traction company was hard up and had not paid the judgment. Meantime respondent had converted the eleven hundred dollars to his own use. Failing to get satisfaction, the client in 1914 wrote the president judge of that county stating the facts and asking for advice. Thereupon the court appointed the local committee of law examiners as a board of censors to investigate the complaint, which was done and report thereof made to the court. Respondent attended some of the meetings of the board and admitted the misappropriation of the money. However, pending that investigation he secured the necessary amount and paid the client. On March 1, 1915, subsequent to the report of the board of censors, the court below entered a rule on

respondent to show cause why he should not be disbarred; before the return thereof he made an oral and written apology in open court for statements made by him before the board of censors, reflecting upon the late Hon. CHARLES N. BRUMM, then a judge of that court. The papers were filed in the office of the prothonotary of that county, but not spread upon the record and show no further action taken therein until said rule was set down for final hearing in April, 1920. On the 21st of the same month the lower court on its own motion issued a new rule upon respondent to show cause why he should not be disbarred for causes which we will now state.

Mr. Wilhelm, who was retained to defend one Enoch Costinski, charged with perjury, gave E. J. Maginnis, Esq., the assistant district attorney, a copy of the judge's notes of evidence of a former trial, out of which the perjury case grew. Two of the three judges, who heard the case in the lower court, find, in effect, that this was done to get evidence favorable to his client before the grand jury, that the bill might be ignored, and that it was unprofessional and an improper interference with the due administration of justice.

Shortly thereafter the court on its own motion entered a rule upon Maginnis to show cause why he should not be disbarred (see opinion of the Chief Justice in Maginnis's Case, 269 Pa. 186), and, while it was pending, Wilhelm by invitation made an impassioned speech to a gathering of some three hundred men at Girardville in said county wherein he took strong ground in favor of Maginnis, said they were trying to crucify him, referred to the disbarment proceedings against the latter as a conspiracy, urged the appointment of a committee, the raising of funds, and, in effect, the taking of such action political and otherwise as might be helpful to Maginnis. He also expressed the opinion that the local judges, when the case was properly presented, would not render an adverse decision, but that if necessary the case should be taken to the state Supreme

Court. After the speech, he took a vote of his audience which with practical unanimity favored Maginnis. The lower court, finds, in effect, that this address was intended to incite popular feeling against the judges and interfere with a fair and impartial consideration of the case. Both rules against respondent were made absolute and therefrom he brought these appeals.

An examination of the entire record discloses no cause for reversal. Sections 73 and 74 of the Act of 1834, P. L. 354, provide: (73) "If any attorney at law shall misbehave himself in his office of attorney, he shall be liable to suspension, removal from office, or to such other penalties as have hitherto been allowed in such cases by the laws of this Commonwealth. (74) If any such attorney shall retain money belonging to his client, after demand made by the client for the payment thereof, it shall be the duty of the court to cause the name of such attorney to be stricken from the record of the attorneys and to prevent him from prosecuting longer in the said court." Here the fact that the attorney had used the money of his client is admitted and the finding that he refused to pay it over upon demand is supported by the evidence, hence it was the duty of the trial court to make absolute the first rule for disbarment: *In re Graffius*, 241 Pa. 222.

As this is a statutory offense the fact that respondent was suffered to continue his practice and association with his professional brethren during the five years is immaterial. Respondent states that when he made his apology in 1915, the president judge said, "The matter is ended." That might well be, so far as related to the contempt, for which the apology was made, but could not have referred to the rule for disbarment as it had not been considered by the court. Aside from that, such statement is not supported by the record and the contrary is found by the trial court. True, the rule was allowed to rest for five years, but the statute of limitations has no application to such case (*People v. Hooper* (Ill.), 75 N. E. Rep. 896); in fact,

it could not in any event apply to a pending proceeding. The delay was not so great as to warrant a dismissal of the rule on the ground of laches (*In re Crum*, 75 N. W. 257), especially as it inured to respondent's benefit and in no respect resulted to his prejudice. Neither does the fact that respondent paid the client, before the rule was acted upon or even granted, wipe out the offense: *In re Samuel Davies* 93 Pa. 116, 122; *Cyc.* 915.

Referring to the second rule, the address delivered at Girardville was such unprofessional conduct as justified the action of the trial court. The rule for the disbarment of Maginnis was then pending and we must assume that respondent intended the natural result of his act, which was to embarrass the judges in the performance of their duty in that particular case by inciting popular feeling against them. This a lawyer may not do while the litigation is pending (*Works v. Merritt*, 105 Cal. 467; *Ex Parte Cole*, 1 McCrary 405; and see *Smith's App.*, 179 Pa. 14; 2 R. C. L. sec. 185, p. 1095); but when a case is finished courts are subject to the same criticism as other people (*Patterson v. Colorado ex rel.*, 205 U. S. 454, 463), and by the lawyer as well as by the layman.

The suggestion of privileged communication is untenable. An improper attempt to influence judicial action is never privileged.

Judge Koch, a copy of whose notes of evidence respondent gave the assistant district attorney, finds it was not done with intent that the same should be used before the grand jury, and, as the transaction is capable of that construction, we are glad to adopt it. The other charges, however, are sustained by the unanimous findings of the three trial judges, based on sufficient evidence; in such case appellate court will be slow to interfere: *Smith's App.*, *supra*.

The record discloses nothing in the conduct of either trial judge to justify criticism. An attorney is an officer of the court, and, when his conduct is in question, it is

proper for a judge to interrogate witnesses. The matter of a continuance was in the discretion of the trial court, and its refusal thereof is not cause for reversal, especially as ample opportunity was afforded for a full investigation. As respondent appeared in answer to each rule, the question of formal notice drops out of the case.

Mr. Wilhelm denies any improper intent on his part, and we realize the consequences to him; yet, the right of a court, in the exercise of a sound discretion, to disbar an attorney for serious misconduct in court or out of court, is undoubted (*Sherwood's Investigation*, 259 Pa. 254, 259), and should be firmly exercised, but with great caution (*Maginnis's Case*, *supra*; *In re Graffius*, *supra*) and only in a clear case. In the language of the United States Supreme Court in *Ex Parte Secombe*, 60 U. S. 12, 13: "The power (to disbar), however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."

The court also has the discretionary power, at some future time, to reinstate an attorney after disbarment (*In re Samuel Davies*, *supra*; 4 Cyc. 917): but, under the facts at bar, whether such power shall be exercised in favor of the present appellant will be for the court below to decide.

The assignments of error are overruled and the order in each case is affirmed at the costs of appellant..

Maginnis's Case

Attorneys-at-law - Disbarment - Procedure - Charges
— Notice — Investigation — Assistant district attorney —
Irregularities in office — Cases before grand jury — Public
official — Presumption of proper motives — Examination
— Incriminating questions — Costs.

An assistant district attorney in charge of a grand jury may add the name of a witness on an indictment, and summon him before that body. The mere fact that he did not make sure the witness would give testimony harmful to defendant, does not justify a conclusion that he acted with an improper motive; and this is especially the case where there is nothing in the evidence to show that the officer acted from any evil or corrupt purpose.

An assistant district attorney will not be disbarred because he took into the grand jury sworn notes of testimony in another case, to check up the testimony to be taken where it appears that he believed defendant to be innocent, and possibly desired the bill to be ignored, but there is nothing to show that he was moved by a corrupt purpose.

In disbarment proceedings, where there are several charges against the attorney, in the office of assistant district attorney, and the accused files an answer in which he avers that he did not misbehave himself, such an answer does not throw open to investigation everything that he may have done during the occupation of his office.

Lawyers cannot be disbarred for breach of good taste, and while they may be disciplined for ethical mistakes, absolute disbarment in such cases can seldom be justified, and this is particularly so where the matter in question is not contained in the written charges assigned as reasons for disbarment.

A court may, of its own motion, institute proceedings for disbarment.

The court may, in such proceedings, call and examine an attorney, subject to his right of declining to answer any question which may incriminate him.

In disbarment proceedings against an assistant district attorney, the accused is entitled to the benefit of the rule that a public official, in the conduct of his office, is presumed to have been actuated in every instance, by proper motives, until the contrary is shown.

Duty of district attorney in proceedings before grand jury defined and explained.

Where an order disbaring an attorney is reversed on appeal, the costs will be imposed upon the county.

Supreme Court.

Rule to show cause why E. J. Maginnis should not be

disbarred. Before BECHTEL, P. J., BERGER and KOCH, JJ. See 16 Schuylkill L. R. 396.

The court made the rule absolute. Respondent appealed. Reversed.

James Gay Gordon, Owen McLane, B. J. Duffy, R. J. Graeff and Jas. B. Reilly, for appellant.— The order was erroneous: *Ex parte Steinman*, 95 Pa. 220; *Com. v. Nicely*, 130 Pa. 261.

Proof of act not charged will not justify disbarment: 6 *Corpus Juris*, p. 605, section 69.

Arthur L. Shay, J. H. Garrahan and James A. Noecker, for appellee, cited: *In re Shoemaker*, 2 Pa. Superior Ct. 27; *Com. v. Bell*, 145 Pa. 374; *Com. v. Bradney*, 126 Pa. 199; *Com. v. Hegedus*, 44 Pa. Superior Ct. 161; *In re Graffius* 241 Pa. 222.

Opinion by Mr. Chief Justice MOSCHZISKER, February 14, 1921:

This appeal is from an order of the Court of Quarter Session of Schuylkill County, disbaring appellant, E. J. Maginnis, and directing the clerk of that tribunal to transmit a copy of the record to the court of common pleas and the orphans' court of the district, presumably for the purpose of disbarments.

No formal allegations of professional misconduct were entered against respondent by any complainant; but— as appears from a declaration to that effect by one of the judges of the court below, contained in the notes of testimony—certain assertions made by Mr. Maginnis, in the judge's chambers, concerning his, respondent's, conception of duty, as an assistant district attorney (which position he then held) to protect the innocent as well as to prosecute the guilty, caused the proceedings now before us for review to be instituted by the court itself.

For the purpose of charging respondent, in some formal manner, with several matters of alleged misconduct, a paper, referred to in the proceedings as a prefatory statement," was filed by the court, in support of the rule for disbarment;

wherein, after reciting that "certain facts concerning the professional conduct of E. J. Maginnis as deputy district attorney" had come to the "judicial knowledge" of the court, the following specific charges are made: (1) In a case against one Leinenbach, prior to the trial of that defendant, respondent told the former's mother-in-law "the character of the evidence adduced before the grand jury, on which the bill of indictment had been found." (2) In another case, against two men, named Kendrick and Stepsky, charged with aggravated assault and battery, respondent caused a certain Dr. Buckley—"who had not been returned by the committing magistrate as a witness for the Commonwealth, and whose name had not been entered as a witness on the bill of indictment"—to be summoned before the grand jury; and this witness gave testimony "that the slight wounds which the prosecutor alleged he had sustained were, in his opinion, not made by a knife;" the bill of indictment was ignored. (3) In another case, against two men named Joseph Yuskis and Lewis Costinski—convicted of assault and battery and aggravated assault and battery, respectively—after their convictions, one Enoch Costinski, a brother of Lewis, confessed that he, and not the latter, had inflicted the wound upon the prosecutor. E. J. Maginnis prepared the confession, and presented it to the judge who presided at the trial, in support of a motion for "a new trial for the convicted men;" following this, the deposition of Enoch Costinski was taken, to sustain his confession; whereupon deponent was prosecuted for perjury, against the official disapproval of respondent. The court then goes on to charge that "without the knowledge of the trial judge, R. H. KOCH, the said E. J. Maginnis had obtained a copy of the notes of testimony, taken by such judge at the trial of said Joseph Yuskis and Lewis Costinski, and had used the said notes of testimony before the grand jury for the purpose of having the bill of indictment, charging the said Enoch Costinski with perjury, ignored; and the bill of indictment, was ignored." The final count charges (4) that E. J. Maginnis

in explanation of his conduct set forth in the last count, "justified his acts by stating that, in the matters alleged, he had acted in defense of the innocent; that he had done so in other cases of which he had had official charge before the grand jury; that he proposed to continue in such course of action in the future; and that he regarded it as his right and duty as an official 'to stand for innocence before the grand jury.'"

The first of the four allegations of misconduct was denied in respondent's answer, and no evidence was produced to support the charge; on the contrary, the person to whom the information in question was alleged to have been given confirmed respondent's denial. Since the adjudication filed by the court below does not refer to this particular count, we must assume that it is treated as not sustained.

In reply to the second count, the answer denies that Dr. Buckley was summoned before the grand jury "solely at the direction and upon the authority of respondent," and avers that the doctor was called "in compliance with the request of members of the grand jury;" that the witness's name was endorsed on the indictment, and private counsel for the Commonwealth was so informed, before the doctor testified; that respondent had no knowledge as to the nature or character of the testimony Dr. Buckley would give, before he appeared in the grand jury room; that the doctor's testimony was not as set forth in the charge; that "respondent took no part in the deliberations of the grand jury upon the bill in question, nor did he attempt to influence that body in any manner as to its finding."

The court reports that Dr. Buckley's name was not returned by the justice of the peace; but, "at the request of some grand juror, made to Maginnis during the presentation of the case, Dr. Buckley was subpoenaed;" that, although the doctor called at the private office of respondent "the evening before he appeared as a witness, Maginnis made no inquiry of him as to what his testimony would be;" that respondent, having been informed the prosecutor

had attempted to corrupt Dr. Buckley, nevertheless summoned him, without advising the court, the district attorney or private counsel for the prosecutor of his intention so to do; finally, that, when the witness appeared before the grand jury, he "gave several probable causes for the wounds, including a sharp instrument, a fall, a blow from a stick or piece of timber and a blunt instrument." On these facts the court concluded that Mr. Maginnis had "called Dr. T. V. Buckley as a witness for the Commonwealth for the purpose of having the bill ignored."

While the court below states that Dr. Buckley "called at the private office of Maginnis" prior to appearing as a witness, the testimony shows that "he merely dropped into" respondent's office for the purpose of asking whether it was necessary for him to attend the grand jury, to which the respondent answered "yes;" and it further shows that the latter had no knowledge whatever of the testimony the doctor was likely to give. We must take this explanation of respondent to be true, for it was in no way shaken by the testimony given when Dr. Buckley himself and other witnesses with knowledge of the facts were called.

Respondent further explained that, although he heard the prosecutor had "offered Dr. Buckley a large sum of money to come and testify in his favor," yet, since the doctor had not appeared, he thought him a trustworthy witness. He said the prosecutor made "very damaging admissions" before the grand jury, and this caused the summons to go out for Dr. Buckley, who possessed some knowledge of the wounds inflicted at the time of the alleged assault. While the evidence on the point is not clear, we can still take but one meaning from it, and that is that the prosecutor's testimony before the grand jury did not properly back up his charge, which occasioned the suggestion, from someone in the grand jury room, that Dr. Buckley be sent for.

Mr. Maginnis testified he notified private counsel for the prosecution that Dr. Buckley was to be called before the grand jury, and it appears from the doctor's own tes-

timony that he also communicated this fact to the same person; but there is nothing to show that respondent stated, either to the court or district attorney, an intention to call the doctor. We do not know what the custom in such matters is in Schuylkill County, but, from experience as an assistant district attorney in Philadelphia, the writer of this opinion has knowledge that, in the latter jurisdiction, the Commonwealth's officer in charge of the grand jury would never hesitate to add the name of a witness on an indictment, and summon him before that body, when the person had relevant information to impart; this is particularly true in an aggravated assault and battery case where, as here, the suggestion so to do comes from a grand juror. In such an instance, the fact that the assistant district attorney did not make sure the witness would give testimony harmful to the defendant, in no sense justified the conclusion that the officer in question had acted with an improper motive in the premises; although due care would seem to dictate that he should inform himself before permitting the witness to testify, and, if in doubt as to his duty, submit the matter to the court for instructions.

A study of all the evidence produced, fails to disclose anything on the record to warrant a finding that respondent summoned Dr. Buckley "for the purpose of having the bill ignored;" but, be this as it may, there is absolutely nothing to show any evil or corrupt purpose on the part of respondent in connection with the transaction under investigation, and, as a matter of fact, the court below does not find any such "evil or corrupt purpose."

The matters referred to in the third and fourth charges are, as previously stated, those which gave rise to the present proceeding. It appears that cross-bills were brought before the grand jury, in which the prosecutors of the two defendants named in the third charge were accused by the latter of offenses against them. There had been a wave of crime in the community where the offenses in question were alleged to have been committed, and respondent, who

lived there, entered upon a minute investigation, in which he became satisfied that the convicted defendants were not guilty.

When Enoch Costinski confessed, this reenforced respondent's thought that innocent men had been convicted; and subsequently it occurred to him, as well as to others engaged in the investigation, that it might be well to have the trial notes—taken by Judge KOCH—in hand when the prosecutors appeared before the grand jury to press their charge of perjury against Enoch Costinski. We have examined these notes, which appear on the record, and find them nothing more or less than the same kind of notes, only in briefer form, that would have been made by a court stenographer, had one been present at the original trial; they were loaned by Judge KOCH to a Mr. Wilhelm, another member of the Schuylkill County bar, and respondent obtained them from him.

When we take into consideration the explanation of Mr. Maginnis (which was not in any way attacked), that he was endeavoring by all means within his control to get at the real truth of the various charges under investigation between the parties to the cross-bills, and this because of the prevalence of crime in the locality in question, we cannot see what there is on the record to justify the accusation that, in obtaining the notes from Mr. Wilhelm, or in using them to check up the evidence given by the prosecutors, before the grand jury, in the perjury charge against Enoch Costinski, the respondent acted with any evil or corrupt design; and, in fact, the court below does not find that he did act with any such design, its conclusion in this connection being simply that respondent's purpose in using the notes was to "have said bill ignored;" and it may be observed that Judge Koch, in a dissenting opinion, states his conclusion that Mr. Maginnis made "use of the notes under the mistaken belief that he was doing right in adopting such a method for the protection of one whom he thought innocent."

It is quite possible that respondent did desire the bill in question to be ignored, for he then believed, and still asserts his belief, that Ccstinski was not guilty of perjury in the matters charged against him; his idea being that the man should have been prosecuted, according to his own confession, for assault and battery, and not for perjury. Since the respondent entertained this belief, it would have been in much better taste for him not to have appeared before the grand jury at all, when the perjury charge was being investigated; but a most careful reading of the testimony fails to show that he was moved by a corrupt purpose in the premises, and, as before noted, the court fails to make any such finding against him.

The court below ruled that, because the answer of respondent contains a general averment stating he did not misbehave himself in his office as assistant district attorney, this threw open to investigation, everything which Mr. Maginnis had done or said at any time during his occupation of such office, ranging over a period of nearly eight years. When made, this ruling was strenuously objected to by counsel for respondent, and each time an investigation of matters not contained in the original charges was entered upon, counsel objected to the evidence; but these objections were invariably overruled, exceptions being allowed.

One of the matters thus examined into, against the objection of respondent, was the adding of certain names, as witnesses, on a return made by a magistrate (not to a bill of indictment). Mr. Maginnis denied that he had added the names or knew anything about the matter. After many witnesses were called, another assistant district attorney admitted that he had put the names on the return; whereupon the court, expressing the opinion that the assistant in question had no doubt acted in entire good faith, and, stating that such practice should not be pursued in the future, dropped the matter.

Another subject investigated, against the protests of respondent, because no charge had been filed covering it,

was an allegation that Mr. Maginnis, after a return by a justice of the peace against a defendant, of simple assault and battery, had drawn a bill charging such defendant with felonious assault and battery. The court found respondent had pursued this course for the "purpose of saving the prosecutors from liability for costs."

It is established law that, when a prosecuting officer is satisfied from his investigations that a higher grade of offense, cognate to the one returned by the committing magistrate, is properly chargeable against a defendant, he may draw the bill accordingly (*Nicholson v. Com.*, 96 Pa. 503); although in some counties permission so to do is first asked of the court. Here the original charge against the defendant in question coincides with the bill as drawn; and this, together with the results of respondent's investigations, is the reason given by him for drawing the bill as he did.

Albeit respondent may have interlined the word "feloniously" in the indictment under consideration, we fail to find any evidence on the record to warrant the conclusion of the court below that he drew the bill in that way with a design to save the prosecutors from costs; but, more than this, we think neither this charge, nor the others not covered by the statement filed in support of the rule to disbar, should have been investigated for the purpose of making findings against respondent—as the basis of his disbarment—without formally reducing the charges to writing, in order to give him due and proper notice thereof. As well said by the court below, in its written opinion, "the rule to disbar did not require him (the respondent) to answer;" and we feel the general allegation of good behavior, contained in the answer voluntarily filed, did not dispense with the necessity for observing the ordinary formalities, which make for proper procedure.

What we have just stated sufficiently covers another matter, elaborately investigated, despite the objection of respondent that it was not contained in the charges against him, in which the court below found that Mr. Maginnis,

"though an assistant district attorney of Schuylkill County at the time, represented a defendant (in a criminal case pending in Philadelphia County) as assistant counsel;" but it may be well to add in this connection that we have read all of the testimony relating to the charge in question and find nothing to contradict the evidence, given by Mr. Maginnis himself, to the effect that, while he sat back of the attorneys for the defendant in the Philadelphia court, when the case referred to was being tried, he did not act as assistant counsel, in the sense of participating as a lawyer in the trial. However this may be, a proper appreciation of the ethics of his position should have dictated to respondent the impropriety of appearing at that particular trial in any capacity, or of associating himself in any degree with a person under criminal charges; but lawyers cannot be disbarred for breaches of good taste, and, while they may be disciplined for ethical mistakes, absolute disbarment in such cases can seldom be justified, particularly where, as here, the matter in question is not contained in the written charges assigned as reasons for disbarment.

We entertain no doubt concerning the power of the court below to proceed of its own motion, as it did in this case, nor of its authority to call and examine respondent, subject to his right of declining to answer any question which might incriminate him (a right of which, fortunately the present respondent was not obliged to avail himself, and it is undoubtedly not only within the power but it is the duty of a court to disbar a lawyer when guilty of corrupt conduct towards his clients or in an official position; for by such corruption he forfeits the certificate of judicial confidence which his admission to the bar holds forth to the public. At the same time, the powers in question must be exercised with the utmost care; and, in a case like the present, where all the charges go to the conduct of the present respondent as a public official (the proceedings being in effect tantamount to impeachment), the accused is entitled to the benefit of the rule that a public official, in the conduct

of his office, is presumed to have been actuated, in every instance, by proper motives, until the contrary is shown. Here, it seems to us, the present respondent was denied the benefit of this rule, and, whenever accused of misconduct, every possible inference was drawn against him, but, even then, the court in no instance has pronounced him guilty of corruption.

On the record before us, the most that can be said of the official conduct of respondent is that, as already indicated, in several cases he failed to show a proper appreciation and professional proprieties, in others he demonstrated bad judgment, and possibly in other he showed a lack of knowledge of the limitations on his powers as assistant district attorney.

As respondent was instructed by one of his judges at the hearing of the rule, it is not for him to try defendants before the grand jury. His duty is simply to see that the evidence of the prosecution is sufficiently produced before that body, and to give the jurors such general instructions on the law as they may require of him; where, after drawing all inferences in favor of the Commonwealth, the evidence fails, in his opinion, to show a *prima facie* case against an accused, but a true bill is found, he may ask leave to enter a *nol. pros.* He should not be present at the deliberations of the grand jury, nor express any opinion on the evidence to the jurors: *Com. v. Bradney*, 126 Pa. 199, 205.

The respondent testified that he endeavored to follow these rules; but, however this may be, it is apparent that, up to the time of the trial of the charges against him, he suffered from an over-solicitous sense of duty toward those whom he believed innocent, and had too high an estimate of his rightful powers to protect them before the grand jury.

While it is the duty of a prosecuting officer to seek justice only, and to see that no innocent person suffers, when a charge is before the grand jury, he, like the members of that body, must resolve all doubts in favor of the Common-

wealth; whereas, when the case comes up for trial before a petit jury, all doubts must be resolved in favor of the accused. For an excellent statement of this rule, see the opinion of the late Judge MICHAEL ARNOLD in *Com. v. McCarthy*, 11 Pa. Dist. R. 161; 162.

As previously said, the evidence at bar indicates that respondent was somewhat confused in his ideas concerning the proper application of the rules to which we have referred, and also in his appreciation of the proprieties, but it fails to show him to have been corrupt in office or controlled by evil purposes, nor are there any unequivocal findings to that effect; in the absence of such proofs and findings, we are of one mind that, on the present record, the extreme penalty of disbarment should not have been visited against him. It may be that respondent needed disciplining, but a short suspension from practice would have accomplished that; and this he has in effect already undergone.

If, after the instruction, on the law and rules of conduct, received by the respondent in these proceedings—which, we entertained no doubt, the court below felt itself obliged to initiate—he again fails to show a proper appreciation of professional proprieties, his future conduct may be viewed in a different light; but, as the case now stands, we feel confident that Mr. Maginnis will profit by the punishment which he has been obliged to suffer.

The record before us, for the reasons given, does not warrant the extreme penalty of disbarment. It is not necessary to pass especially upon each of the assignments of error; we sustain the first thereof, which complains of the final decree.

We shall make an order as to costs similar to that entered in *Sherwood's Case*, 259 Pa. 254, 262.

The decree is reversed; the costs below and on this appeal to be paid by the County of Schuylkill.

Welker vs. Eastern Pennsylvania Railways Co.

Negligence - Contributory negligence - Infant - Age of discretion.

When the facts and circumstances shown by the plaintiff fail to prove negligence or warrant an inference of negligence the presumption is that the employe was performing his duty in a proper manner.

A child is presumed to arrive at the age of discretion when seven years old and when under that age it is the duty of the parent to exercise due care over it and if the child is permitted to go into a dangerous place the parent is guilty of contributory negligence.

Charge to the Jury. No. 59, January Term, 1919.

R. J. Graeff, for plaintiff.

O. E. Farquhar, for defendant.

KOCH, J.

GENTLEMEN OF THE JURY:— You have heard related to you by the witnesses on the stand, the sad occurrence of an accident to a little child, in the month of November, 1917, on Broad Street, in the borough of Tamaqua, when, with the permission of its mother, it had gone from its home on Cottage Avenue down to Broad Street to see a parade that was being given in honor of departing soldiers. Broad Street is the principal business street of Tamaqua, and upon it the defendant company operates a trolley road. At the time of the occurrence, there were some pools of water in the street; the street was paved; the rails were wet; and, as the car came along at that point, in some unexplained way this child appeared on the street in between the curbstone and the trolley track. There is only one witness to this occurrence, as I recall it, a young man who was delivering bread on the opposite side of the street. When he saw the child approaching the track, he knew there must be an accident, appearances to him indicated such, that he became very much excited and he called out. He did not know what he said. He called out - - - one expression, according to the woman to whom he was delivering bread, was "My

God, a child," or words to that effect. The car was moving slowly, according to this witness, and it was under the control of the motorman. A signal had been given of its presence, and of its intention to proceed on its assigned path. The car stopped so quickly that it stopped, according to the woman, within a yard or yard and a half, or something like that, within a very short distance; and, according to the testimony of the young man that was delivering the bread, it stopped within a foot or two. There is no evidence, under that state of facts, to show that the motorman was guilty of anything. It was his business to run the car; that was what he was employed for. It was the business of the railway company to proceed with its traffic. That is why the people boarded the cars, to be carried to points of destination. There was nothing in the road. There is not a particle of evidence here that when that motorman put on power to start that car, this child was visible anywhere. There was not a soul off the sidewalks. The only two things on the street there were things that had a right to be there, the delivery wagon of the baker, and the delivery wagon of a liquor dealer; and they were well by the respective curbstones, or by the sides of the respective curbstones. So, under such conditions, the motorman's business was to proceed, cautiously, however, with his eyes open, and alert, and ahead of him, to see, whether his path was clear to proceed. There is not any evidence here that his path was not clear when he started, not a particle. There is no evidence here to show that he was not alert, or did not do everything that he was called upon to do. Giving the signal, having the car under control, proceeding slowly, stopping within a couple feet, all indicate that he was not reckless.

This action, like all actions of trespass, for personal injuries, rests entirely upon the proof of negligence on the part of the defendant. The facts and the circumstances shown by the plaintiff must either prove negligence on the part of the defendant, or they must be of such a character as to enable the jury to fairly draw the inference of negli-

gence from them. As this case lacks positive proof of negligence and lacks proof of facts from which you might fairly draw the inference of negligence, the presumption is that the motorman was performing his duty; that he was doing it in a non-negligent manner. That presumption stands until it is rebutted, either by direct proof, or by circumstantial proof. And I do not see that either direct or circumstantial proof rebuts the presumption, and, therefore, it stands as the controlling feature of the case. It shows that the defendant was not guilty of negligence.

But the case has another feature. The plaintiff must not only show that the defendant was negligent in the premises, but the jury must be fairly satisfied that the plaintiff is himself free from negligence, because, even though the defendant in a case of this character be very negligent, be recklessly so, yet, if the plaintiff himself contributed in the least degree, by his own negligence, he cannot recover. The law does not apportion, in a case of this character, and set apart the respective ratios that each one's negligence bears to the combined negligence that results in an accident. Any particle of negligence on the part of a plaintiff deprives him of the right of recovery. Unfortunately, this child, which was a bright little thing, was only five years and two months old at the time of this unfortunate occurrence.

Under the law, a child is presumed not to have arrived at the age of discretion until it is seven years old. So this child was under the years of discretion, and it was, during that while a particular charge upon its parents, and that charge and responsibility always increases as the dangers or the risks in the neighborhood of the child increase. Here this child went down on to a street that ordinarily is well traversed, with all forms of traffic upon it, and a trolley road. It was permitted to go down, not when circumstances were usual and ordinary, but it was permitted to go there when the traffic was perhaps largely augmented, when there was a degree of excitement attending the going away of

the boys; bands were playing and everybody was alert and alive, and ready to see and look on and applaud, and cheer, or to do what they felt like doing. Under such circumstances, might not a child be supposed to partake, in a measure of the excitement that seemed to enthuse the whole mass of people on the street? And even though it may have been a very bright little child, and capable in a large degree, of taking care of itself, would it not take up some excitement, and forget itself, and, childlike, run out into the street after the parade? You often seen little children following a band. They run out and follow a band and they may run out and follow a parade. What caused this child to run out, what its purpose or object was, we do not know. But, under the circumstances, it was the duty of the father - - - he not being there, then of the mother - - - to exercise more than ordinary degree of care over this child. The circumstances required and demanded of her that she exercise greater care over the child than she would ordinarily, because, as I stated a while ago, the excitement attending such a circumstance is of itself, enough to make the child eager to see and to hear and to enter into what is going on, and to be forgetful of its own care.

So, that, in my view of this case, whilst it might be possible to infer negligence - - although I do not see where it lies in this case - - - on the part of the defendant, yet the plaintiff could not recover, on account of the contributory negligence of this mother. The little youngster wanted to see, as youngsters all do, and as some old people want to see, - entirely natural, - - and it would have been better for its mother to have laid down her work, and taken this little child, and been with her, under the exciting circumstances of the case. I may be entirely wrong in the conclusion that I draw from this case, but my oath obliges me to say to a jury what my view of the case is, and when my view of the case is clear to me, I am obliged to lay it down to you, to tell you the truth about it. Then, if I happen to be wrong, my two colleagues will correct me. If I hap-

gence from them. As this case lacks positive negligence and lacks proof of facts from which fairly draw the inference of negligence, the plaintiff stands until it is rebutted, either by direct proof or circumstantial proof. And I do not see that either, it stands as the controlling feature of negligence, shows that the defendant was not guilty of negligence. But the case has another feature. The plaintiff not only show that the defendant was negligent premises, but the jury must be fairly satisfied plaintiff is himself free from negligence, though the defendant in a case of this character negligent, be recklessly so, yet, if the plaintiff himself tributed in the least degree, by his own negligence, he recover. The law does not apportion, in a case of this character, and set apart the respective ratios that each negligence bears to the combined negligence on the part of an accident. Any particle of negligence on the part of plaintiff deprives him of the right of recovery. Undoubtedly, this child, which was a bright little thing, five years and two months old at the time of this fatal occurrence.

Under the law, a child is presumed not to have at the age of discretion until it is seven years old that while a particular charge upon its parent charge and responsibility always increases as or the risks in the neighborhood of the child increase this child went down on to a street that ordinarily traversed, with all forms of traffic upon it, road. It was permitted to go down upon it, where were usual and ordinary traffic upon it, when the traffic was not excessive, and where there was a degree of care.

the boys; bands were playing and everybody alive, and ready to see and look on and applaud or to do what they felt like doing. Under such es, might not a child be supposed to partake of the excitement that seemed to enthuse the people on the street? And even though it n a very bright little child, and capable in a large taking care of itself, would it not take up some and forget itself, and, childlike, run out into the parade? You often seen little children follow the parade. What caused this child to run follow a parade. We do not know. But, its purpose or object was, we do not know. But, circumstances, it was the duty of the father --- he there, then of the mother --- to exercise more than degree of care over this child. The circumstances and demanded of her that she exercise greater care child than she would ordinarily, because, as I s while ago, the excitement attending such a circumsta itself, enough to make the child eager to see and and to enter into what is going on, and to be forge its own care.

So, that, in my view of this case, whilst it mig possible to infer negligence -- although I do not see i it lies in this case --- on the part of the defendant, ye plaintiff could not recover, on account of the contribu negligence of this mother. The little child wanted see, as youngsters all do, and as so people want see, - entirely natur and it w been bett for its mother to h down he d taken th little child, and be er, und ing circum stances of case, in the con elusion of I a n obliges m and when my lay it down if I happen e. If I hap-

pen to be wrong, upon further consideration of this case, after this evidence has all been reduced to longhand, and I have gone over it with a fine toothed comb, and find a particle of evidence here which should send this case to a jury, I will very cheerfully say so, and if I cannot cheerfully say it, my colleagues will say it for me, and then the case will have to be tried again. When a compulsory nonsuit is entered, the evidence is then reduced to longhand, and then the case is brought up before the three judges and is argued before them, so as to get their united judgment upon it, and if I am in error, then this case will be tried eventually. But at this very threshold I feel it is incumbent upon me to say that the plaintiff has no case, and for that reason we grant the motion for a compulsory nonsuit, and relieve you from further consideration of it.

We will enter, for the plaintiff, a motion for a rule to strike off the compulsory nonsuit, or to show cause why it should not be stricken off.

Appeal of Albert Thompson

Hearing tax appeals - Separate appeals - Duty of owner of unseated land - Valuation of land for taxable purposes.

Hearing on an appeal from the board of revision may be before one or more judges in counties having more than one judge, is a matter of convenience and practice and after hearing by one judge the proceeding follows the practice in equity and it is within the power of the court in banc to review all findings and fix different amounts and percentages. A separate appeal must be taken from each assessment.

It is the duty of an owner of unseated land to return it to the county commissioners with a particular description and to furnish the name of the original warrant or warrantee.

Assessors and all other taxing authorities must assess, rate and value every subject of taxation for local purposes according to the actual value thereof and at such rates and prices as the same would bring at a bona fide sale after due notice, but when the market value has thus been ascertained it becomes the duty of the court on appeal under the act of April 19, 1889, P. L. 37 to reduce the market value of the property for the purpose of assessment so that the ratio between the market and assessed value shall be the same as the ratio existing between the market values of all the real estate throughout the county.

Appeal from Triennial Assessment. No. 394, May Term, 1919.

G. M. Roads and W. C. Devitt for appellant.

A. L. Shay and C. A. Snyder for County Commissioners.

Per Curium.

This is one of six appeals by Albert Thompson from the triennial assessment of a tract of land owned by him, made by the county commissioners of Schuylkill County, sitting as a board of revision. The parties hereto will hereinafter be referred to as the appellant and the appellee, respectively. All the judges of the court sat to hear the testimony, and after the evidence had been transcribed, to hear the argument, at which counsel for the parties presented to the court a number of requests for findings of fact and conclusions of law. The case was then assigned to Koch, J., who disposed of it in all respects as if it were a proceeding

in equity which had been heard by him alone, sitting as a Chancellor. He reduced the valuation made by the board of revision to a large extent, in an order in the form of a decree nisi. To this order, as well as to his findings of fact and conclusions of law, a number of exceptions were filed by the appellee which were argued before the court in banc and are now before us for disposition. In *Lehigh & Wilkes-Barre Coal Company's Assessment*, 225 Pa. 272, 275, it was held that whether the hearing on an appeal from the board of revision shall be before one or more judges in counties having more than one judge, is a matter of convenience and practice, but that it is customary for a single judge to hear the case in the first instance, and thereafter the proceeding follows the practice in equity, by analogy. But whether the hearing be before one or more judges it is quite clear, as is stated in *Lehigh & Wilkes-Barre Coal Company, Appellant, v. Luzerne County*, 231 Pa. 481, 483, cited with approval in *Lehigh Valley Coal Company, Appellant, v. Luzerne County*, 255 Pa. 17, 22, that "If he (the trial judge) erred in judgment in fixing the valuation of a virgin acre of coal in place, or in determining the percentage of unmined and available coal still remaining, or in ascertaining the ratio of assessed to actual value of other lands in the district, it was within the power of the court in banc to review all of these findings and to fix different amounts and percentages." This applies with greater force to the case at bar because all the judges heard the testimony.

It is undisputed that the appellant acquired the land in question in January, 1906, for \$320,000, in one purchase as part of a contiguous tract lying in the townships of Butler, Cass, New Castle, West Mahanoy, Ryan and Blythe, and that the total acreage of the entire tract is 10,288 acres, of which 5969 are barren, and the balance, 4319 acres, are coal bearing lands. The apportionment of this acreage to the respective townships is as follows:- New Castle, 1893 coal, 2135 barren; Ryan, 240 coal, 115 barren; West Mahanoy,

208 coal, 206 barren; Cass, 612 coal, 345 barren; Butler, 1169 coal, 1599 barren; and Blythe, 197 coal, 1569 barren. The acreage in each township is subdivided into the several original warrants. The number of original warrants in each township is as follows:- New Castle, 16; Ryan, 6; West Mahanoy, 3; Cass, 6; Butler, 11 and Blythe 8. In New Castle, Cass and Butler townships all barren land was assessed by the board of revision at a uniform rate of \$5 per acre, and all coal land at \$130 per acre; in Ryan and Blythe townships at \$6 and \$225, respectively, and in West Mahanoy Township at \$12 and \$775, respectively.

Under the authority of *Woodburn v. Wireman*, 27 Pa. 18, 21, it is clear that assessments made in the manner in which the board of revision made those now under consideration cannot be regarded as a valuation of the appellant's land in each township as an entire tract, or assessable unit, but that the assessment in New Castle township, as made by the board of revision, which is the subject under discussion, is an assessment of sixteen separate tracts, each tract corresponding with one acquired by an original warrant. The appellant furnished the county commissioners with the information required by the Act of April 3, 1804, Sec. 1, 4 Sm. L. 201, and of March 28, 1806, Sec. 1, 4 Sm. L. 346, Vol. 4, Purdon's Digest, pp. 4980, 4981, for the purpose of enabling them to make a proper assessment of his unseated land. They did not assess the contiguous warrants in each township together as an entire tract, but assessed it as different tracts, corresponding with the original surveys or warrants.

When the owner felt aggrieved by the assessments made in New Castle township by the valuation placed upon each of his sixteen separate tracts of land he entered but one appeal, that now under consideration, from the assessments in that township. This was done either because the appellant regarded his entire acreage in New Castle township as one tract for the purposes of this proceeding, or

else he was advised that under the Act of April 19, 1889, P. L. 37, he was required to file but one appeal for that township, though aggrieved by each of sixteen separate assessments. If one appeal was sufficient for New Castle township, it would seem to follow that the appellant could have filed one petition, or have entered one appeal, to cover the six townships in which his land lies, consisting of fifty separate tracts assessed to him, by the assessment of every one of which he felt aggrieved. We believe that a separate appeal lies, and must be taken, from each assessment whereby one is aggrieved. Therefore we have treated this as an appeal from the assessment of the appellant's lands in New Castle township as an entire tract.

The question whether the township, or the acreage of an original warrant, is the unit for assessment, upon this appeal, came before us on the appellant's offer to prove the value of his land with the acreage of an original warrant as the unit for assessment. The Court held that in assessing his contiguous warrants in each township all the warrants would have to be taken together as an entire tract, and the entire acreage in each of the six townships would have to be valued separately. An exception was taken to this ruling by the appellant, who then offered evidence to establish the value of his land as entire tracts in each of the six townships. The correctness of the ruling was not brought before the court in banc, when it sat for the final disposition of this case, either by an exception, or a request for a finding of law, that the original warrant was the unit of assessment. The decree nisi entered by Koch, J., fixed the value of the appellant's land in each township as an entire tract, but no exception was taken to the decree by the appellant. In our opinion, the question is not now before us for consideration, but since our brother Koch is firmly of the opinion that the ruling is erroneous, and the error so fatal as to require the reopening of this case for the purpose of allowing the appellant to prove the value of

his land, divided into a number of tracts, as shown by the original warrants, we deem it necessary to discuss the point briefly on its merits.

The mischief intended to be remedied by the Acts of 1804 and 1806, *supra*, was that the owners of unseated lands frequently withheld their land from taxation altogether, to remedy which it was made the owner's duty to return it to the commissioners with a particular description, and to furnish the name of the original warrant or warrantee: *Harper v. Farmers' and Mechanics' Bank* VII W. & S. 204. In *Heft v. Gephart*, 65 Pa. 510, 517, and in *Hutchinson v. Kline*, 199 Pa. 564, 568, it was held that the owner of parts of several distinct warrants which were contiguous might return them as one tract and have it assessed as a whole. If parts of several distinct warrants which are contiguous and united in one owner may be assessed as a whole, it would seem that several entire warrants, under like circumstances, may also be so returned and assessed. Moreover, neither of the acts referred to enjoin a duty on the county commissioners to assess unseated lands in separate tracts corresponding with the original warrants or surveys.

The appellant treated his acreage in each township as a unit for assessment by taking but one appeal for each township. Since his acquisition of the lands he has designated them, notwithstanding their original division by warrantee names and the present division by township lines as the "Albert Thompson lands, known as the Broad Mountain lands." When he testified to their value instead of apportioning the value of the whole tract to six townships, as he might have done under the court's ruling, he valued his lands as a whole and he offered and sold them as a whole after his appeals had been taken. We therefore conclude, as is ruled in *Philadelphia & Reading Coal & Iron Co., Appellant, v. Northumberland County Commissioners*, 229 Pa. 460, 471, that if a tract of unseated lands is divided by township lines "each part thereof should be valued and assessed upon

the acreage in the respective townships."

The ground of this appeal is that the valuation of the appellant's barren land at \$5 and of his coal land at \$130 per acre, is excessive, unjust and illegal, because it is higher than the market value thereof if offered and sold at a bona fide public sale after due notice, and is not uniform with the valuation of other real estate throughout the county as measured by the standard fixed by law, which raises the issue for determination. In *Philadelphia & Reading Coal & Iron Company, Appellant, v. Northumberland County Commissioners*, 229 Pa. 460, 466, the general rule is laid down "that assessors and all other taxing authorities are required to assess, rate and value every subject of taxation for local purposes according to the actual value thereof, and at such rates and prices as the same would bring at a bona fide sale after due notice." But when the market value has been thus ascertained it becomes the duty of the court on appeal, under the Act of April 19, 1889, P. L. 37, to reduce the market value of the property for the purpose of assessment, so that the ratio between its market and assessed value shall be the same as the ratio existing between the market and assessed value of all the real estate throughout the county. As is stated in *Delaware, Lackawanna & Western Railroad Company's Tax Assessment (No. 1)*, 224 Pa. 240, 247, "There can be no doubt of the legislative intention which finds expression in the act of 1842 and the earlier statutes, that actual selling value shall be the standard to determine assessable value, and if the question could be squarely raised as to the proper value to be placed upon real estate in any district, or in all districts, the courts would necessarily hold that actual selling value was the proper standard for fixing assessable value. However, the constitution and the act of 1889 have emphasized the principle of uniformity as more important than the standard of valuation. The assessed valuation should as nearly as possible represent the actual value, but it must be uniform

no matter whether the proper standard is followed or not. It is a well-known fact that from the beginning of our state government to the present time in nearly every section of the commonwealth the assessed value of property is ridiculously low as compared with actual value."

The appellee offered in evidence the assessment made by the board of revision and rested. This made out a *prima facie* case in favor of the assessment, and the burden was then upon the appellant to overcome it by the weight of the evidence: *Lehigh & Wilkes-Barre Coal Company's Assessment*, 225 Pa. 272, 276; *Philadelphia & Reading Coal & Iron Company, Appellant, v. Northumberland County Commissioners*, 229 Pa. 460, 468; *Washington County v. Marquis, appellant*, 233 Pa. 552, and *Lehigh Valley Coal Company, Appellant, v. Northumberland County Commissioners*, 250 Pa. 515, 523, 524. To overcome this *prima facie* case the testimony of three mining engineers, John R. Hoffman, Edwin Ludlow and J. B. Warriner, was introduced by the appellant to establish the value of the land by their expert opinion. Their testimony is supplemented by the appellant's own testimony; that of two county commissioners who were members of the board of revision; by the testimony of D. W. Kaercher, Esq., A. D. W. Smith and George S. Moore; and by maps and other documentary evidence.

In arriving at the market value of the land from the evidence, Koch, J., accepted the testimony of John R. Hoffman to the exclusion of all the other evidence, and attached to it sufficient weight to overcome the *prima facie* case made out by the record of the assessment fixed by the board of revision. In declining the appellant's 34th request for a finding of fact that a fair method of arriving at the market value of the land was to average the values fixed by Hoffman's and Warriner's testimony he said: "I decline this request. I will separately dispose of the appeal from the assessment in each township to the number and term of the appeals respectively. But in so doing I shall be controll-

ed by the testimony of Mr. Hoffman as his valuations in the aggregate most nearly approximate that of the owner of the lands himself."

The only testimony of the appellant respecting the market value of his land is that he bought it as an entire tract in January, 1906, for \$320,000; that he sold off some of it in two sales at a time not fixed, since 1906, for the aggregate sum of \$86,000 or \$87,000; that at one time he had offered it for \$500,000, and would now take \$400,000 in cash for it. He also offered to prove when the appellee was about to open its case, after an adjournment, that in the intervening time he had sold the entire tract at a bona fide public sale after due notice for \$300,000. In our opinion the testimony of the appellant, to the extent that it is relevant or competent, is open to the insuperable objection that by it a value is placed, or sought to be placed, upon the tract as a whole, and there is no basis upon which from the consideration of the other evidence the aggregate value of the land can be apportioned to the six townships in which it lies. Where a tract of land is divided by township lines the acreage in each township is the unit for assessment: *Philadelphia & Reading Coal & Iron Company, Appellant, v. Northumberland County Commissioners*, 229 Pa. 460, 471. And if a contiguous tract was originally owned or acquired by different warrantees, it must, nevertheless, after it has once been acquired as a whole and is so owned and enjoyed, be assessed as a whole: *Washington County v. Pittsburgh Plate Glass Company, et al.*, 18 D. R. 817.

After having arrived at the market value of the land 75 per cent. of that value was taken as the assessed value, because Koch, J., was of the opinion that the evidence established that the assessed value of real estate generally throughout the county is 75 per cent. of its market value. The only testimony before us to establish the ratio between actual and assessed value throughout the county is that of Brobst and Leib, two of the county commissioners who sat

as members of the board of revision, and it was offered by the appellant. The testimony of Brobst is that as a member of the board of revision he assessed other lands at about 75 per cent. of their market value, and that this land was assessed by the board of revision at the same ratio. Leib, the other commissioner, said that no fixed ratio was applied by the board of revision, but that the appellant's land had been assessed at 75 per cent. of its market value, because that was the ratio used in fixing the assessed valuations of coal lands generally throughout the county. The board of revision did not pass upon the assessed value of any land other than coal land. Their testimony does not establish that 75 per cent. of the market value of real estate is the basis of assessed value generally throughout the county, nor can we find from the evidence that real estate is assessed generally throughout the county below its market value, which distinguishes this case from *Lehigh & Wilkes-Barre Coal Company's Assessment, v. Luzerne County*, 225 Pa. 267, which was remanded to the court below because the court, after having found, as a fact, that other real estate in the county had generally been assessed below its market value, had failed to ascertain and apply the ratio between market and assessed value.

Though the appellant has failed, in our opinion, to establish that his assessment is not uniform by comparison with the assessments prevailing generally throughout the county, nevertheless, if the weight of the evidence is that the full market value of his land is lower than the present assessment, he is entitled to relief. No attempt was made by the appellant to establish the market value of the land based upon recent sales, either public or private, due no doubt to the close manner in which anthracite coal lands in this county are held, which makes sales so infrequent as not to furnish a real guide to market value. Two of the engineers called by the appellant had themselves prospected at least a part of the entire Thompson tract. John R. Hoff-

man made his explorations in 1867 under a lease he then had, which he surrendered because he did not "discover enough coal to warrant a practical operation." The number of acres underlaid with coal and the existence of three of four coal basins upon the tract is undisputed, as is also the fact that the land underlaid with coal contains the Lykens Valley, Buck Mountain, Seven Foot and Mammoth veins. His testimony was received under an offer to prove, in addition to the facts just stated, that later explorations of the property were made by others with the same result, as an element to be taken into consideration in fixing its market value. He placed a value of \$382,694 upon the entire tract, \$152,680 representing the value of the land in New Castle township, which is at the rate of \$37.9 per acre, and is the result of a close study of the property made by him.

Edwin Ludlow did his prospecting in 1887 and 1888 for a subsidiary of the Pennsylvania Railroad Company, which had an option to lease the land which was not exercised after he had made an unfavorable report upon the property. He placed a uniform value of \$10 per acre upon the land in the townships of Butler, West Mahanoy and Ryan, but placed no value upon the land in any of the other three townships, because he had not sufficiently explored them. This seems to be conclusive that he depended entirely upon his personal knowledge of the property in fixing values. The values testified to by J.B. Warriner are the result of his "fair and conscionable appraisalment" of the property from information which he had derived as follows: "A. Well, I have checked all previous maps and records and bore hole records and reports, and have walked carefully over the surface to check the amount of prospecting that had been done in the past, whether in my judgment or not it thoroughly covered the area. I have checked the adjoining properties and ownerships, the work done nearest to it by other companies, and so forth; in general, anything of an engineer-

ing nature that would lead me to form any opinion on it." He placed an aggregate value upon the entire tract of \$197,190, \$80,360 representing the value in New Castle township, or at the rate of \$20 per acre.

To rebut this testimony the appellee called Samuel G. Crawford, whose qualification as a mining engineer was admitted, and did not call another qualified engineer, John R. Strauch, his collaborator, because it was agreed that he would corroborate Crawford in every particular. Crawford, in reaching his opinion upon the value of the land, testified that he took into consideration the surface examination of the property; the owner's map of the property and the State Geological surveys; information received from practical miners and derived from reading various engineers' reports of the property; and a knowledge of sales (no doubt private sales) of other anthracite coal lands. But the main factor was the amount of coal which he believed the various veins upon the property contained based upon knowledge of the existence of the veins upon the property and their thickness on the other properties nearby where they are found and mined. He estimated the quantity of coal in the property and after rejecting 50 per cent. of this quantity for support, and 25 per cent of the remainder for the contingencies arising in mining, he concluded that 25 per cent. of the estimated coal in place represented the marketable tonnage of the property, to which he applied a value of eight cents per ton. He had testified in chief that the value of the land in New Castle township was \$551,770.68, or at the rate of \$161.80 per acre, and that the manner in which he arrived at these figures was as above stated, the appellant brought out on cross-examination. A motion to strike out the testimony of Crawford, after his examination had been completed, was made on the ground that in fixing the value of the property he had taken into consideration elements affecting or entering into the determination of the market value of the land other

than those which are recognized as proper elements in Philadelphia & Reading Coal & Iron Company, Appellant, v. Northumberland County Commissioners, 229 Pa. 460. Our learned colleague being of the opinion that the motion to strike out ought to have prevailed, entirely disregarded the testimony of the appellee's engineers.

It is clear that the foot acre rule for ascertaining value is not applicable to this property and that the engineers for the appellee did not use it. What they did was to take into consideration the elements to which reference has already been made, and after a consideration of all of them, used their best judgment in arriving at the value of the property. Merely because their main factor was the amount of coal estimated by them to be in place does not establish that they used the foot acre rule. The method used by Hoffman and Warriner was not essentially different from that used by Crawford and Strauch. That the first named took into consideration, to some extent, the quantity of coal which they believed to be upon the land is evident from the fact that they did not value it as barren land. It is conclusive, from the elements which they admittedly took into consideration, that they included the coal upon the land, though they did not estimate it in tons. This was but the application of an intelligent judgment in the determination of value. The use of eight cents per ton as an estimate of the value of the estimated quantity of marketable coal upon the land by Crawford and Strauch is not open to the objection that thus a present value of the land was fixed on the basis of its value at a future period, because the eight cents is not royalty (royalties being much greater), but an estimate of the present value of coal which is to be mined in the future. Crawford said that it is an accepted mining practice to use eight cents per ton of the estimated marketable tonnage of coal in the land as a factor in valuing the land. In rebuttal, Warriner did not contradict this, but said that the method was not applicable to the appellant's lands, be-

cause it is applicable only to ordinary coal lands as a method to determine values. He also stated that in his opinion eight cents is too high, and that three cents per marketable ton in place is of general application, in fixing the value of ordinary coal land. This makes it clear that the only difference between Crawford's method of valuation and Warriner's method of valuation arises out of the fact that Crawford treats the Thompson lands as ordinary coal lands, and that Warriner does not so regard them. This represents merely a difference of professional opinion, as does also the variation in the value per ton. Our opinion is that when the market value of a property cannot be ascertained by recent sales' values, its value may be established by the opinion of mining engineers, who must take into consideration all matters affecting the probable selling price of the land, including the probable quantity of marketable or mineable coal in the ground, and that this is all that the appellee's engineers did in this case, which does not conflict with the principles laid down in *Philadelphia & Reading Coal & Iron Company, Appellant, v. Northumberland County Commissioners, supra*, and *State Line & Sullivan R. R. Co's. Taxation*, 264 Pa. 489.

After a careful consideration of all the evidence we have reached the conclusion that the assessment of the appellant's property in New Castle township, made by the board of revision at the sum of \$256,775, is not too high. It is but 75 per cent. of the market value as ascertained by the board of revision, and the appellant's evidence does not overcome the *prima facie* case made out by the record of the assessment, which is supported by the testimony of Crawford and Strauch. There is no evidence in this case that the county commissioners, sitting as a board of revision, acted arbitrarily, or without sufficient reliable information and evidence in making the assessment. What we have said also applies to, and is decisive of the appeals in the townships of Ryan, Cass and Butler. In Blythe and West

Mahanoy townships a tifferent question arises, because the testimony of all the witnesses is that the valuation placed upon the land in those townships by the board of revision is too high, and this is sufficient, in our opinion, to overcome the *prima facie* case made out by the appellee's offer of the record of the assessment. In the disposition of those appeals we shall fix the assessed value, after having given due consideration to the evidence, at a value lower than that fixed by the board of revision.

The appellee has filed thirty-six exceptions to the findings of fact and conclusions of law made by Koch, J., in fixing the assessed valuation of the land in New Castle township at the sum of \$114,150. In accordance with the views expressed in this opinion we dismiss the 19th, 20th, 24th, 25th, 26th, 28th, 29th, 30th, 31st, 33rd and 34 exceptions. The 19th is dismissed, because there is some competent evidence to sustain the appellant's contention, which we have found to be insufficient to overcome the record of the assessment. The 24th is dismissed because we are of the opinion that the triennial assessment made in 1916, unappealed from, having been introduced by the appellant, may be regarded as a declaration against his interest. It also throws some light upon the apportionment of values to the six townships. The 29th and 30th are dismissed because we are of the opinion that the conclusions of law, which it is alleged were erroneously affirmed, were affirmed by our learned colleague, because in his opinion the foot acre rule is not applicable to this case, with which we agree.

We sustain exceptions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 27, 32, 35 and 36. When disposition is made of the appeals from the assessments in Blythe and West Mahanoy townships the 12th, 13th, 15th, 16th, 21st, 22nd and 36 th exceptions, which we have sustained in this appeal, will be dismissed for the reason heretofore stated. For the reasons above set forth we enter this

FINAL DECREE

And now, December 13, 1920, appeal dismissed. It is further ordered and decreed that for the purposes of taxation the appellant's 4028 acres of unseated land in New Castle township consisting of 16 original contiguous warrants, namely, Andrew Kelwig, Necho Allen, Daniel Will, Charles Cherry, Jacob Lindermuth, Mamey Cherry, P. W. Jackson, Barbara Artilla, George B. DeKeim, Barbara Artilla, Abraham Bailey, Barbara Graeff, Francis Artilla, Henry Miller, Barbara Graeff and Sebastian Graeff, are valued as one tract and the value is fixed at the sum of \$256,775; and that the appellant shall pay the costs of this proceeding.

DISSENTING OPINION BY KOCH, J. December 13, 1920.

All the evidence relating to this appeal as well as to five other appeals taken by Albert Thompson from the assessment of his land in the townships of Blythe, Butler, Cass, New Castle and Ryan was taken at one and the same time was reduced to typewriting and filed to the above number and term. Very much of said testimony has a direct and common bearing on each one of the six appeals, and the legal principles involved in this appeal are common to all the appeals. And, in disposing of the six appeals last September, I filed my findings of fact and conclusions of law to the appeal wherein the testimony is filed, so as to bring together at one place all that relates equally to all the appeals, for I think that may avoid any confusion that might otherwise arise. But the court's opinion which sets at naught most of my leading findings of fact and conclusions of law and all of my decrees nisi is numbered to No. 394 May Term, 1919, which is the appeal for the lands in New Castle Township. However, I shall file this opinion to No. 388 May Term, 1919, and will have only my dissent noted in the five other appeals, referring in each dissent to this opinion for the reasons of such dissent.

1. In the court's opinion it is conceded that the appellant paid \$320,000 in January 1906 for fifty tracts of unseated lands lying contiguous to one another, situate in the townships of Blythe, Butler, Cass, New Castle, West Mahanoy and Ryan, and together containing 10, 288 acres. It is further conceded that "the acreage in each township is subdivided into the several original warrants."

The appellant testified that he had sold part of the land to a water company for \$36,000 or \$37,000 and another part, adjoining the Borough of Frackville, for \$50,000. The latter was divided into building lots. He further testified that he is willing to sell the balance of the land at any time for \$400,000. Later, after a long lapse of time had intervened in the taking of the testimony on said appeals, the appellant offered to prove that in the meantime he had bona fide sold at public sale, after due notice, all of his said lands for the sum of \$300,000. Therefore, in view of such facts, if the decrees now being entered in these six appeals are permitted to stand, the sum total of the assessments of all of said lands will, for each of three successive years, be \$624,172, or more than twice as much as the marketable price or value of all the land. I have no reason whatever for doubting the veracity of appellant or of his counsel. On the contrary, the word of his counsel, whom I have known very well for over forty years, requires, so far as I am concerned, no one to vouch for its entire truthfulness.

2. It is further conceded that the appellant, in compliance with the Act of March 28th, 1806, 4 Smith Laws, 346, 4th Purd., 4981, plac. 3, gave to the county commissioners a list of all his unseated land, indicating each original tract separately by giving its acreage and the name of its warrantee.

The tracts must, therefore, be separately assessed, the owner not having directed that they shall be assessed together as one. "The tax laws as to unseated lands treat them entirely in reference to the original warrants, when not otherwise directed by the owners." *Heft v. Gephart*, 65

65 Pa., 510. See also *Hutchison v. Kline*, 199 Pa. 564. Nor do I know of any authority that allows a single tract of unseated land to be divided into separate parts for assessment, if the whole is owned by one owner. In *Mineral Railroad and Mining Company v. Northumberland County Commissioners*, 229 Pa., 436, 447, the Court of Common Pleas of Northumberland County said, "In no case should a tract of land owned by the same party be divided for the purpose of assessment unless it lies partly in one township and partly in another." And it seems to have passed muster in the higher court. In all the appeals the lands were arbitrarily divided into coal land and barren land, without indicating any dividing lines or establishing any method of their exact location. Let us observe the form of the assessments in West Mahanoy Township. It stands thus:

UNSEATED

ALBERT THOMPSON

Coal	Barren	Rate	Value	Warrantee
	67	12	804	Peter Yohe
185		775	143375	Christian Keister
	110	12	1320	
23		775	17825	Chas. Cherry
	29	12	348	Chas. Cherry

\$163772

It was the duty of the assessor to assess as one tract the 295 acres which compose the warrant for the Christian Keister tract and also to assess as one tract the 52 acres which compose the appellant's holdings under the Charles Cherry warrant; and if the assessor failed to do his duty, it became the commissioner's duty, and as they failed, it now becomes our duty, for we must hear the case *de novo*: 224 Pa. 240; 225 Pa., 272; 229 Pa., 461; and 250 Pa., 515. "***** the assessment made by the assessor remains the assessment, no matter whether raised or lowered by the commissioners or the courts until final adjudication; it may

become an altered assessment at the final decree, but nevertheless it is still the assessment directed by law, although not in exact accord with the act of the first officer making it. It is so understood and so called in both common and legal parlance, and no one can be misled by the title which so names the subject." *Rockhill I. & C. Co., v. Fulton County*, 204 Pa., 44, 50. Our duty "is not that of a clerk to the county commissioners, but that of a court whose duty it is to hear, deliberate and decide, and then make a proper record of" our adjudication. *Ibid* 46. But, instead of assessing the tracts according to their respective warrants, we ignored the names of the warrantees and insisted upon having proof of the value of all of appellant's lands taken together in each separate township. Therefore, we are now utterly without any evidence whatever as to the value of any separate tract taken as a whole. The appellant offered to prove the value of the land covered by each warrant but he was not allowed to do so, and now, when he was not allowed to do a permissible thing, he is told, in effect, that for not doing the impermissible thing of testifying to the value of all of his lands taken together in each and every township respectively, it shall count against him and operate to his great prejudice and damage. It was our duty to hear the several assessments properly, for now we have naught to base our decrees upon excepting the assessments offered by the county commissioners, and even those were made without a proper regard for the law. The law governing assessments of land for the purpose of taxation is statutory, and neither the assessor, county commissioners, boards of revision or the courts on appeal have authority to proceed in any other manner than is prescribed by the statutes; *Coal and Iron Co., v. County Commissioners*, 229 Pa., 461. And their undertaking to divide certain tracts was just as unlawful as it was for us to undertake to consolidate all the tracts in any single township. By the decrees now to be entered this court has assessed all the lands of the appellant

taken together in the respective townships, not with his consent or by his direction, but over against his implied objection.

I cannot agree that "the appellant treated his acreage in each township as a unit for assessment by taking but one appeal for each township." He took his appeal upon the record just as it stands in the commissioners' office. His name stands but once on the assessment book for each township and below his name stand the assessments for the different tracts, many of which are cut up into barren land and coal land. Thus in New Castle township where the court finds there are 16 warrantees there are 25 assessments, all under the name of "Albert Thompson, formerly Chas. T. Borie." In the case of Rockhill I. & C. Co., v. Fulton County, 204, Pa. 44, 46, there was but one appeal covering 16 tracts and the court below and the Supreme Court considered and disposed of the appeal without question. Nor did the appellee question the appeals here. We went on and heard all the appeals here without raising any such question and it is not our business to raise it now. It is our duty to see that the lands are properly assessed. Nor does the Act of 19th April, 1889, P. L., 37, authorizing appeals from assessments say that the owner must appeal from each separate assessment, nor does the act of 26th June, 1901, P. L., 601, authorizing appeals to the higher courts, say that an appeal must be entered for each separate assessment. Each appeal mentions "lands" & "tracts."

3. I agree that the assessment as made by the board of revision upon its presentation as evidence by the appellees made out a prima facie case on behalf of the appellees. This is based upon the presumption that the appellees did their duty. But, "If the testimony as to the value of any particular land is uncontradicted and is worthy of belief, that value should be conclusive; if the testimony be conflicting the court must use its best judgment in determining from the weight of it, what is a just valuation." Lehigh Valley

Coal Company v. Northumberland County Commissioners,
250 Pa. 515, 525.

The commissioners' assessment is only *prima facie* evidence of its correctness. But an inspection of it shows that it is not correct, because of an apparent defect upon its face, to wit, the division of the several tracts into barren land and coal land. The appellant offered to show the value of each tract taken as a whole but he was not allowed to do it. Instead, he was obliged to show that when all the assessments in one township were added together the figures arrived at exceeded the real value of the land. And he met that test fully and to me convincingly, so convincingly, that I think no one who heard all his testimony would ever think of buying such lands at such figures as the board of revision fixed for their value in the six townships above named. I believe that every witness who testified told the truth as he perceived it. My learned brothers do not seem so to believe. When they come to the townships of West Mahanoy and Blythe they seem, at least, to believe some of the witnesses and thus find that the *prima facie* case of the board of revision is overcome, for they fix the total value of all the lands in Blythe township, taken together, and consisting of eight warrantees and eleven separate assessments, at \$27,500, whereas the sum total of the appellee's figures is \$53,739. And in like manner the court fix the value of all the tracts taken together in West Mahanoy township at \$44,000, whereas the figures of the appellees amount to \$163,772. The majority of this court have adopted two methods of disposing of these six appeals. In the appeal for the township of West Mahanoy they take the testimony of Crawford and Strauch, the appellees' engineers, who value all the land at \$43,968, and the testimony of John R. Hoffman, one of the appellant's engineers, who values the lands at \$44,072, and then fix the assessment at \$44,000. In Blythe Township they do the same. Crawford and Strauch there fix the total at \$29,879.20 and Hoffman at \$23,299 and

the court fix it at \$27,500. It will be noted that the appellees' total valuation for West Mahanoy is nearly three and three quarter times as high as Crawford, Strauch and Hoffman respectively make it; and in Blythe township the appellees' valuation is nearly twice as high as that fixed by this court. If Hoffman's mature judgment and great knowledge, both personal and general, is acceptable to overcome a prima facie case in those two instances why shall his testimony be discredited and rejected in the other four instances? And the same applies to the testimony of Strauch and Crawford. All the testimony in the case is disregarded in the other four townships, namely, Butler, Cass, New Castle and Ryan. If the appellees so greatly erred as to double or quadruple the values in the townships of Blythe and West Mahanoy, what facts in the case give such potency to their values in the four other townships as to withstand the assaults of every witness in the case? All the evidence adduced in these appeals is simply ignored by the court where it has reference to the four townships of Butler, Cass, New Castle and Ryan. The evidence of the appellees own engineers, being entirely uncontradicted as to the acreage, should alone overcome the appellees' prima facie case. I will quote here from the appellees' record and from their engineers' estimated area in parallel columns and will set down the totals so that the contradictions will appear readily.

Township	Character of land.	Areas in Acres as per Assessment Books			Engineer's Estimated area in acres	
		Coal	Barren	Total	Coal	Barren
W. Mahanoy	Coal	208			210	
	Barren		206			204
	Total			414		
Ryan	Coal	240			275	
	Barren		115			80
	Total			355		
Blythe	Coal	197			196	
	Barren		1569			1570
	Total			1766		
Butler	Coal	1169			892	
	Barren		1599			1876
	Total			2768		
Cass	Coal	612			555	
	Barren		345			402
	Total			957		
New Castle	Coal	1893			1895	
	Barren		2135			2133
	Total			4028		
Total	Coal	4319			4023	
Total	Barren		5969			6265
Total, coal and Barren			10288			

Now when we total these columns, we find the total area of coal lands in the assessment books is 4319 acres and the total area of barren lands is 5969 acres, whereas the estimates of the engineers, who spent two days on the land and some time on the geological map and on the owner's map and on some other data, show a total of 4023 acres of coal land and 6265 acres of barren land, - an apparent difference of 296 acres less of coal land and 296 acres more of barren land.

4. When the appellant on several occasions offered to show the value of each separate tract I expressed the view

that the offer should be received, but it was rejected; and, when I came to consider all the testimony, I felt obliged to give due weight to the fact that all the land taken together had cost the appellant \$320,000 in 1906, and that he had in the meantime received not less than \$86,000 for parts of the land which he sold, and also that he would sell his land at any time for \$400,000. This testimony is not disputed. An owner knows, or should know, at least as well, if not better than any one else, what his property is really worth. There is authority to support this statement. In *Mineral Railroad and Mining Company v. Commissioners*, 229 Pa., the court said at page 479, "Appellant being the owner for such a long period of time, presumably had the best knowledge of the actual value of the lands ****." Also see *Coal and Iron Company v. Commissioners*, 229 Pa., at page 472, where the Supreme Court said, "Appellant was the best judge of the value of his own lands ****." Now John R. Hoffman is the only witness whose valuations, taken in the aggregate, approximate the total valuation of \$400,000 fixed as the selling price by the owner himself; and let it be not forgotten that the owner offered to show that later he actually did sell the land for \$300,000. The aggregate of Hoffman's valuation is \$382,694, and, in view of the appellant's personal testimony, I could not follow the opinion of J. B. Warriner, one of the appellant's witnesses because his valuations total only \$197,190, as against appellant's valuation of \$400,000. Both Hoffman and Warriner valued the land in each township conformably to the court's requirement that the land in each township must be taken together as constituting one tract. Nor could I take Mr. Ludlow's testimony because he valued the land only in three of the townships. His testimony, however, has value in this, that he fixes the value in each of three townships at not exceeding ten dollars per acre, whereas the appellant's total valuation of \$400,000 for the 10,288 acres shows his average value per acre at \$38.88. Mr. Ludlow had personal know-

ledge of only the northern part of the New Castle township lands and part of the Cass township lands, but was not permitted to testify as to their value, because he was required to testify to the value of all the lands taken together in each township.

I disregarded the testimony of Crawford, a witness for the appellee. It was agreed that John H. Strauch would testify the same as Mr. Crawford. Therefore, in disregarding the testimony of Mr. Crawford I also disregarded what Mr. Strauch would have testified to. For such disregard I have several reasons that appear to me as entirely sound and controlling.

(a). First reason. Their valuation for all the lands in the township of Butler, consisting of 2762 acres, is \$406,274, and their valuation for all the lands in the township of New Castle, consisting of 4018 acres is \$651,761 and each of these valuations exceeds the valuations of all the lands in the six townships taken together as testified to by the owner himself. It must be remembered that the owner's entire acreage is 10,288 acres as compared with a far less acreage in each of said townships. Further, Crawford's and Strauch's total valuation of all the lands in the six townships is \$1,502,661.08, or more than five times the amount for which the appellant undertook to prove that he sold the land, and it is over three and three-quarter times as much as the owner testified he would sell the entire property for.

(b). Second reason. The greatly preponderating and controlling factor that enters into the valuation of Crawford and Strauch is their supposed quantity of coal in place, whilst the most positive and uncontradicted evidence in the case gives no warrant whatever for such suppositions. They say there are on some of these lands as many as five veins of anthracite coal. Beginning at the one nearest to the surface and going down, there is supposed to be in their order, the Mammoth, the Skidmore or Wharton, the Buck

Mountain, the Upper Lykens Valley and the Lower Lykens Valley. Crawford was on the land twice, taking a day each time but with what closeness he examined the 10,288 acres, or over 16 square miles, of land he did not clearly make known. It is obvious that the examination could not have been particular as to the whole of that vast area. Those two engineers, however, had access to some data, the principal of which was the map of our State Geological Survey, which survey and map A. D. W. Smith, a civil and mining engineer and his collaborators made over thirty years ago. They did Smith the honor of relying upon his map of the surface of the land, but this court seems to ignore Smith's verbal testimony as to what is not likely to be found below the surface. The work of the geological survey compelled Smith and his associates to traverse and examine, I apprehend, every acre of this land, and it took them months and months to do it. Whereas Crawford and Strauch spent two days on the land, and their suppositions ignore all the positive testimony in the case. They assumed twelve feet as the average thickness of the Mammoth vein, four feet as the average thickness of the Skidmore or Wharton vein, six feet as the average thickness of the Buck Mountain Vein, three feet as the average thickness of the Upper Lykens Valley vein and three feet as the average thickness of the Lower Lykens Valley vein, and they then estimated the areas of those veins; and, taking into consideration their length, breadth, pitch and supposed thickness of pure coal, found the solid coal contents of all the veins and assumed one-fourth thereof as ultimately reaching the market; and fixed the value thereof, in place, at eight cents per ton. Edwin Ludlow, a mining engineer of thirty-five years active experience, in the years 1887, 1888 and 1889 explored for the Pennsylvania Railroad Company the lands in all these townships, excepting Blythe. Appellant offered to show that Mr. Ludlow expended \$80,000 in such explorations, but he was not permitted to prove that fact. However, Mr.

Ludlow's explorations did not find the coal that Crawford and Strauch supposed is on those lands. He put down drill holes and slopes. Diamond drill holes were put down as far as 1400 feet in the centre of the basin, through into the red shale, followed by horizontal drill holes from the bottom of slopes, and he found the Lykens Valley Vein was but little pockets of coal, "perhaps enough to cause you to put in a lot of money and not get it out." He put one slope down 700 feet and found that the pocket of coal was only 100 feet on the line of the slope and 30 feet on each side, and he exhausted all the coal to make the necessary steam for their work. It was merely a pocket. Mr. Ludlow went down 1174 feet at the Mud Run Basin and found that where the Lykens Valley should have been there was only one inch of coal, and where the Buck Mountain vein should have been there was only another inch of coal, and the three other veins were respectively one inch, one and one-half feet thick and two inches thick. Adding these together, we find there were less than two feet of coal where Messrs. Crawford and Strauch suppose there are 28 feet of coal. Mr. Ludlow testified that in Ryan Township, where the Crystal Run Colliery had been erected, the project had to be abandoned because in every direction they went they ran into faults. What the supreme Court said in *Rockhill I. & C. Co., v. Fulton Co.*, 204 Pa., at page 50, fits in pretty well here: "The testimony of appellee is based on the mere supposition of witnesses having no exact knowledge of the subject; they could not see hundreds of feet into the ground; they assumed from slight outcroppings on contiguous land that these were coal lands and so at one time did the owners; but the drill and pick demonstrated the mistake."

Crawford and Strauch themselves demonstrated that their foot-acre method of calculating the supposed tonnage of coal in place solely and absolutely controlled their judgment in fixing their valuations of the coal lands. As illustrations, we will take their figures for only the townships

of New Castle and Butler.

In New Castle township they estimate 1895 acres as coal land and 2133 acres as barren land, and they estimate the total tonnage of marketable coal at 8,013,700, which, at eight cents a ton in place, they value at \$641,096, and to this they add \$10,665 for the 2133 acres of barren land at the rate of \$5 per acre and thereby fix \$651,761 as the value of all of the appellant's lands in New Castle Township. In Butler township they estimate 892 acres as coal land and 1876 acres of barren land, and they estimate the total tonnage of marketable coal at 4,961,175, which, at eight cents a ton in place, they value at \$396,894, and to this they add \$9380, which is at an average of \$5 per acre for the 1876 acres of barren land, and thereby fix \$406,274 as the value of all of the appellant's lands in Butler township. Now, in the light of such testimony by Crawford himself (See too his blue print), it seems incomprehensible to me that my learned brothers should say, "It is clear that the foot-acre rule for ascertaining value is not applicable to this property, and that the engineers for the appellant did not use it. What they did was to take into consideration the elements to which reference has already been made, and after consideration of all of them, used their best judgment in arriving at the value of the property." And these are "the elements to which reference has already been made," to wit, "the surface examination; the owner's map of the property and the state geological survey; information received from practical miners and derived from reading various engineers' reports of the property; and a knowledge of sales (no doubt private sales) of anthracite coal lands." In the majority opinion of this court, we nevertheless find: "But the main factor was the amount of coal which he believed the various veins upon the property contained." I, therefore, still remain of the opinion that the testimony of Messrs. Crawford and Strauch should not be considered in arriving at the fair market value of these lands. Nor can

I subscribe to the statement that, "The method used by Hoffman and Warriner was not essentially different from that used by Crawford and Strauch." A careful reading of their testimony does not, in my opinion, sustain that statement.

5. As to the ratio of assessed valuation to real valuation. Of course, all lands should be assessed at their actual value, but when lands generally throughout the county are assessed below their actual value it is unfair and unlawful to disregard that fact upon appeals for alleged excessive assessments. "The assessed valuation should as nearly as possible represent the actual value, but it must be uniform no matter whether the proper standard is followed or not. It is a well-known fact that from the beginning of our state government to the present time, in nearly every section of the commonwealth, the assessed value of property is ridiculously low as compared with actual value." Del. L. & W. R. R. Co's. Tax Assessment (No. 1) 224 Pa. 240, 247. That "well-known fact" has thus been taken notice of judicially, and that same "well-known fact" finds illustrations, here in this county and has always found it so far back that "the memory of man runneth not to the contrary." Every intelligent person who knows anything whatever about real property and taxation in this county knows that generally throughout the county real estate is assessed below its real value, and particularly that in the towns it is far below its real value. The members of this court, in common with all intelligent people in this county, know that general fact, and I think we should take some judicial notice of it and should be reasonably controlled by it.

Suppose it were material in a case upon trial in this county to know the general temperature of the weather here in winter. Would any judge in this commonwealth, who might happen to preside at the trial, call for witnesses to prove that it is generally cold here in winter time? Or would he proceed without such proof upon the proposition

that it is a "well-known fact" that we generally have cold weather all over this state in winter time? But, for instance, if a personal action, based on facts originating in the Sandwich Islands, were brought in this county and it became material for the court and jury to know the general temperature on the islands in winter, proof might be required to show some of the jury and, perhaps, the judge that it is never cold on the Sandwich Islands.

Let us be frank about this thing. I must assume that my brothers are acquainted with that "well-known fact," mentioned by Mr. Justice Elkins in the opinion last quoted from, at least so far as it concerns their own real properties, for we all know that our own properties are assessed "ridiculously low as compared with actual value." Since reading the opinion of this court which is about to be handed down, I have taken the trouble to look at the assessment of properties owned by, or standing in the name of the wife of, respectively the members of the court, the counsel and the commissioners who took an active part in this appeal, and also the properties standing respectively in the names of several of the most active members of the "Tax Revision Party" mentioned by Mr. Leib in his testimony. All but two of those who took part in the hearing live here in the city of Pottsville, and I find that our properties vary in their assessed values from ten per cent to thirty-three per cent of their actual value. Years ago when I was in the active practice of the law I had occasion to learn that our farm lands and homes of the humble were ratably assessed higher than other properties all through this county. It may be said that these matters are off the record and I admit that they are, but they are not off of my conscience, and I do not propose that my conscience shall be lulled to sleep because some one may say "your well-known facts are off the record." Properties situate on the principal streets of our city and which are highly productive are all assessed below half of their actual values, and I am unwilling that

Mr. Thompson shall be compelled to pay taxes on the actual value of mountain lands which at present seem to produce nothing but snakes and huckleberries. The question raised by these appeals under the conditions which exist in this county is not a question of law only, it is a matter that should address itself to one's sense of fairness and justice.

Doubtless, the county commissioners had knowledge of the "well-known fact" that few, if any, real properties are assessed at their actual value, and therefore applied it. They are presumed to have done their duty because they are presumed to have known and understood their legal duty, and therefore to have done it when they assessed the appellant's land at 75 per cent of what they considered the full value thereof.

E. C. Brobst who had been a county commissioner for over eight years prior to the hearing on these appeals, and must, therefore, have had something to do with at least two prior triennial assessments in this county, testified that the commissioners did not assess other lands "at their full market value;" and, when asked the ratio, Brobst said, about 75 per cent as near as he could tell. The following appears on the record of his testimony;

By Judge Berger:-

"Q. Do I understand from that, that sitting as a member of the Board of Revision of taxes you used seventy-five per cent of the actual market value of the property as the basis of assessment by your board?

"A. Yes, sir; I think it was.

"Mr. Shay:- What was the answer?

"Judge Bechtel:- He said yes.

"Judge Berger:- He said they used seventy-five per cent of the market value as the basis of assessment by the board of revision; and that is fairly competent evidence.

"Mr. Shay:- Yes, sir, we have no objection to that."

But notwithstanding the fact that Judge Berger ruled that it was "fairly competent evidence," and that Judge

Shay who is the appellee's counsel impliedly admitted that Brobst's statement was correct and true, the court now says, I had no right to make use of this important piece of testimony in my humble and apparently unsuccessful effort to ascertain fair assessments for the appellant's lands.

W. S. Leib, who had been a county commissioner for only fifteen months, was called as a witness and testified that they "had no fixed ratio." He also told us that they had before them said engineers, Crawford and Strauch, who then represented the "Tax Revision Party." The following appears in the course of Leib's testimony.

"By Judge Berger:-

"Q. In discharging your duties then as a member of the board of commissioners, sitting as a board of revision, did you in this particular case assess this particular 110 acre tract at its full market value as you ascertained it for that purpose?

"A. We thought we had assessed this 110 acres upon about the same basis as what other coal lands in that vicinity were assessed at.

"Q. But the question is whether the assessment represented, from the information you had received, its full market value, one hundred per cent?

"A. I would not say one hundred per cent. I would say seventy-five per cent of its market value."

Further on in Mr. Road's examination of Mr. Leib the following appears.

"Q. You always allowed something to meet the condition that applied uniformly, a difference between assessed and market values on property in this county, didn't you?

"A. Yes, sir, on account of the irregularity of some of the assessments.

"Q. And that percentage you think was about twenty-five per cent, is that right?

"A. On this particular case I would say yes.

"Q. And throughout would it be twenty-five per cent, do you think?

"A. We felt so. Some thought of a good many of the coal lands that it was one hundred per cent. We did not think so.

"Q. No, but I mean the allowance that you made.

"A. About twenty-five per cent.

"Q. Generally throughout the county?

"A. Yes sir, that is on the coal lands.

"Q. On the coal lands?

"A. Coal lands.

"Q. Now how was it outside of the coal lands?

"A. They did not come up before us, because we had assumed that the assessors had done their full duty."

The only appeals to the board of revision related to coal lands, excepting one case which was settled or withdrawn.

We further find the following on the record in Leib's testimony.

"By Judge Berger:-

"Q. Judge Koch's question is this, did you or did you not, take seventy-five per cent of the value that you arrived at from the conflicting testimony?

"A. Our own judgment; yes.

"Q. You first arrived at the market value from the conflicting testimony and then you put the assessed valuation based upon seventy-five per cent?

"A. Yes, sir, upon what we thought was a fair valuation.

"Cross-examination by Mr. Shay.

"Q. You did that on all coal lands in the county?

"A. All the coal lands in the county.

"Q. All that were appealed?

"A. Yes, sir."

The position of my learned brothers seems to me somewhat anomalous. Here we have the testimony of the com-

missioners that they assessed all coal lands at seventy-five per cent of their real or market value. The commissioners therefore, considered the real value of the lands in West Mahanoy Township at \$218,362.66, and assessed them at 75 per cent of that, or \$163,772, whereas the court now fixes their full value at \$44,000, and so assesses the lands as one tract. And likewise in the township of Blythe, the commissioners must have found the full value of the lands at \$71,652, and assessed them at \$53,739, whereas the court now fixes their full value at \$27,500 and so assesses them as one tract; while in the townships of Butler, Cass, New Castle and Ryan they let the 75 per cent assessments of the commissioners stand upon the presumption that they did their duty when they assessed the lands in those four townships; and in doing this the court necessarily accepted the seventy-five per cent basis in four of the townships and totally rejected it in the other two. Again the court's decrees assess lands as indicated in parts of warrants, or in entire warrants, in the said four townships, and consolidate all the lands in the other two townships but giving the names of the warrantees composing each township unit.

7. The loyal citizen will cheerfully pay his just share of all the taxes which are necessary; but no one should be compelled to pay more than his just share. Hence all properties, both individual and corporate, should be assessed in accordance with the law of the land, to wit, at their actual value. If so assessed, taxation will be uniform and no one will be harmed thereby either in his person or estate. It will mean justice to all so far as taxation is concerned. No individual or corporation will then pay more or less than he or it should honestly pay, and the tax rate will be very much lower than it now is, for the total amount of all taxes will not become greater, but the rate will become uniform. In order that they may do their duty properly, I think the assessors should be given power to inquire from each owner as to the actual value of such owner's property,

and, if the assessor thinks it necessary, then to require the owner, or his qualified representative, to make affidavit to the fact.

I regret that my brothers and I cannot see these matters in the same way. But the appeals are before us and we must deal with things as they are, or, at least, as we understand them to be. I would now affirm the appellant's twenty-fifth request which I inadvertently omitted to answer. I would dismiss all of the appellee's exceptions and would then re-open the case to let the appellant tell us the value of each separate tract and to find out what is the general average ratio of assessment values to actual values in this county, even if we were obliged to call in every assessor in the county, and, perhaps, many real estate agents and also others qualified to speak. In that way a great and lasting public service could be rendered, and the assessors might become so well acquainted with their duties, that, within a very few years, the many errors of the past would be avoided. Every tax payer would be put upon a basis of equality, and farmers and owners of humble homes would no longer be obliged to pay an unjust proportion of the taxes to which all should contribute ratably.

For the reasons hereinabove stated I respectfully dissent from the decree entered in the appeal stated in the the caption hereof, and for the same reasons will note my dissent in the other five appeals referred to.

Estate of William Buechley

Testamentary capacity - Issue - Undue influence.

Where a person has testamentary capacity, but is so weak, physically or mentally, as to be susceptible to undue influence and a substantial part of his estate is left to one occupying a confidential relation to him, the burden is upon the latter to show that no improper influence controlled the making of the will, but in a case where the decedent's testamentary capacity is conceded and there is no evidence of weakened intellect, the burden is upon those asserting undue influence to prove it even where the bulk of the estate is left to one occupying a confidential relation.

Appeal from Register of Wills. O. C.

Cyrus G. Derr and G. M. Roads, for appeal.

J. W. Moyer, contra.

WILHELM, J. May 16, 1921.

This is an appeal from the decree of the Register of Wills admitting to probate the will of William Buechley, and a petition to frame an issue directed to the Court of Common Pleas to try by jury whether (a) the said alleged will is the last will of William Buechley; (b) whether the will was procured by undue influence unlawfully exercised by William Buechley, Jr., aided and abetted by others; (c) whether William Buechley was at the time of executing said alleged will of a sound and disposing mind.

The first and third propositions seem to have been abandoned by the contestants, and they admit that the testator was possessed of testamentary capacity to make a will. Therefore the only question here to be considered is that of undue influence exercised in procuring the execution of the will. And the primary question to be considered in this connection is:- When undue influence is alleged, upon whom rests the burden of proving it.

Under the authority of *Miller vs. Miller*, 179 Pa. 645, and 187 Pa. 572, the contestants take the position that where a decedent, although possessed of testamentary ca-

capacity, favors a son who occupies a confidential relation, a presumption is raised that the will was procured by undue influence, and the burden is on the son to rebut that presumption.

While it is true, in the second Miller case, the last paragraph of the syllabus appears to lay down the rule as above stated, and the statement of the Supreme Court, in considering the fourteenth assignment, which embraced the appellants' third point, wherein it was stated that the appellants were entitled to an unqualified affirmance of the third point, probably actuated the reporter in framing the last paragraph of the syllabus, yet a careful reading of the language of the court indicates that the lower court was criticised for qualifying their affirmance of the third point by saying in effect there was no evidence that the son was the trusted and confidential agent of his father, when the evidence of the son himself showed that he stood in that relation to his father. The lower court said in *Friend's Estate* 198 Pa. 366: :“We do not think it was the intention of the Supreme Court there (Miller case) to hold, as the syllabus quoted indicates, that in the absence of testimony tending to show that the mental faculties of the testator were impaired, the burden of sustaining the will would be cast upon a son standing in a confidential relation to the testator who received a large portion of the estate.” In affirming the action of the lower court, page 371, refusing an issue, where it appeared that the son was his mother's trusted and confidential agent and was largely preferred the Supreme Court said: “On due consideration of the testimony, and of the clear and satisfactory opinion of the learned judge of the orphans' court, we affirm the decision of the register and dismiss the appeal.” Therefore, we take it that the construction placed upon *Miller vs. Miller* by Judge Over when he said “What was said in *Miller vs. Miller* upon this question should be construed in the light of the facts of the case, and it appears in the opinion of *Miller vs. Miller*, 179 Pa. 645 that an important factor in granting an issue in that case was the fact that there

was evidence from which the jury might find that the testator's mental faculties were greatly impaired" met with the approval of the higher court.

In *Phillips Estate*, 244 Pa. 35, Mr. Justice Moschzisker in an exhaustive opinion has considered many if not all of the cases bearing upon undue influence in the procurement of a will, and the sufficiency or insufficiency of the testimony governing the granting of an issue devisavit vel non, wherein he has deduced several rules to guide when this question is raised. It does not appear from anything contained in this opinion that a new rule was intended to be laid down in *Miller vs. Miller*, and the rule in *Phillips Estate* appears to be: Where a person has testamentary capacity but is so weak physically or mentally as to be susceptible to undue influence, and a substantial part of his estate is left to one occupying a confidential relation to him, the burden is upon the latter to show that no improper influence controlled the making of the will, but in a case where the decedent's testamentary capacity is conceded and there is no evidence of weakened intellect, the burden is upon those asserting undue influence to prove it even where the bulk of the estate is left to one occupying a confidential relation.

Every man is presumed to have testamentary capacity, and every will is presumed to have been executed by one whose mind is healthy, strong and free. Where it is conceded the testator had mental capacity to make a will, the charge that undue influence was exercised by one occupying a confidential relation to procure the execution of the will must be supported by evidence to show that the mind was impaired.

In this case the testator was a man seventy-four years of age at the time of his death, and about sixty-five years old at the time the will was executed. He had acquired a fortune of about one hundred and fifty thousand dollars in the lumber business. He was the father of three children, one of whom was a son who was his business partner for about twenty years before his death, a daughter, who was

married and living in Reading, and who frequently visited him down to the time of his death, and who received visits from her father, notably on Christman Day each year down to Christman Day, 1909, the date of the last visit, and another son, who conducted himself in a manner displeasing to the father, and to whom the testator never became reconciled. The testator was an active business man during the whole of his life until he was stricken with progressive paralysis, which resulted in his being confined to his house in the year 1915, and thereafter. He was a man of intemperate habits, a frequenter of drinking places, particularly in the afternoon and evening, and on several occasions drank to such excess that he remained in one of the saloons for a week or ten days. In his latter years his eye sight began to fail him, and he required an attendant to accompany him and assist him at street crossings when going to and from his home and office, so that he could more easily step up or down at the street crossings, and avoid the risk of accident from moving vehicles. In the year 1906, he fell, his head striking a stone step, was removed to a hospital where he was treated for several days.

The contestants allege that the fall which occurred in 1906 was the beginning of a mental and physical breakdown, which progressed during the remainder of his life. It is testified by Mrs. Kenney, the daughter, that her father was a changed man after the accident in 1906. "He seemed to me as if he was under a dope of some kind. He took no interest in things and not the bright, smart man he had been. It was, well, I do not know; I could not attribute it to drink alone; I do not know whether drink would do it, and I have never been around anybody entirely out of their mind. I do not think he was out of his mind. I think he was not himself; he was not normal." Mrs Kenney also testified that she saw a change in her father just before the accident, and he was "worse after." "He seemed to take more to drink, and he was irritable and things annoyed him. Little things that father never paid any attention to—they

annoyed him." His daughter also testified that on Christmas Day, 1909, when her father last visited her, he seemed helpless.. "I noticed that day a big change in my father. He would only answer in syllables. He did not seem able to hold a conversation." "I thought he had a light stroke" in his right arm. "I noticed he took his left hand to get it (food) to his mouth. He could not get it up to his mouth."

Judson Kenney, the son in law of the testator, in reply to the question "What was his condition physically in 1907 on to his death," said "Well, his condition was not what you would call normal." This witness speaks of the accident in 1906 or 1907 and said "He never seemed to me to be the same man mentally after that that he was before." And in describing the visit to witness' home in Reading Christmas Day 1909, this witness said when he saw him on his arrival. "I took him to be very much under the influence of liquor." And he says when he took him back to the train the testator" appeared to be very much better when I met him, when I took him from the train."

This testimony of the daughter and her husband is the only expression of opinion or circumstance tending to show mental weakness before the execution of the will. Each of these witnesses express opinion of mental decay without relating a single convincing fact which would warrant the opinion. Neither of them relates any conversation showing a weakened intellect or recites a single word or sentence uttered by the testator that would indicate that he was suffering from mental debility before or at the time of the execution of the will. Therefore the contestants have failed to show that the testator was so weak physically or mentally as to be susceptible to undue influence, and there being no competent evidence of weakened intellect, the burden is upon the contestants to prove undue influence notwithstanding the chief beneficiary under the will is a child occupying a confidential relation to the testator.

There is no direct evidence of undue influence. The contestants aver that there are circumstances from which it

may be inferred the testator was so weak mentally and physically that his mind could have been operated upon, and his intelligence controlled by the chief beneficiary. Considerable importance is attached by the contestants to the testimony of David Hill, the paid companion of the testator, but the testimony of this witness concerning the time he began his service of assisting the testator in passing along the streets is loose, if not contradictory, and it cannot be said with certainty that Hill's services in attendance upon the testator were rendered before the execution of the will. But irrespective of the time fixed by his testimony, as to the beginning of the service, his opinion as late as 1913 was that the testator was not a "feeble-minded" man, but was feeble physically.

The testator drank to excess on occasions, and probably many occasions. He was a daily visitor to saloons and drinking places. He shed tears when he received the letter from his wayward son asking for forgiveness. He declared his favored son to be a "hog" because he wanted "it all," and did not want "Laura to have anything." If any inference can be drawn from the fact that he was a frequenter of saloons, drank to excess, and, therefore, a man of weakened intellect, that inference is overcome by the testimony of a number of witnesses who were friends and others who were business associates, officers and directors of the bank, where he held the office of director, some of whom served with the testator as an auditor of the affairs of the bank, all of whom testified to his keen mind and his competency to perform his duty as an officer of the bank and attend to matters of business generally. His declaration at the Shadel saloon that he would not comply with his son's wish that his daughter should not have anything was carried into effect and the will contains a bequest to her. If it is true that the chief beneficiary was endeavoring to influence his father to the extent of disinheriting the daughter, he failed, and this evidence strengthens the presumption that the mind of the testator was free from that influence when he wrote and

signed the will.

William Buechley, Jr., was the partner of the testator in the lumber business and an enterprise or two subsidiary to it for a number of years. Necessarily their association was close in business matters. He lived aside of his father for a long time, and in the year 1911 a door was put in place connecting the two houses on the third floor, and the evidence shows that the family of William Buechley, Jr., had free access to the home of the testator not only from the third floor where the new doorway was established but on the street floor both front and rear, and it can fairly be said that intimate social relations existed between the families. It is fair to conclude that with the advance of years responsibilities both social and business were shifted from the shoulders of the testator to those of the son, and greater reliance was constantly being placed in the son by the father. All of which shows abundant opportunity to unduly influence of the mind of the testator to the disadvantage of children not so favorably situate.

The testimony also shows that, at the time of the making of the will, and for three years after the testator lived his own life outside of business hours and his son was not his companion from the time he left his place of business until he retired at night. In fine there is no evidence here to show that the chief beneficiary exercised a watchfulness over the testator that would prevent the testator from having communication with others in his absence and thereby afford an opportunity to discuss his business matters and the disposition of his property by last and testament. In fine the freedom of the testator from observation and control on the part of the son does not strengthen the thought or suspicion that the opportunity to unduly influence the testator was seized. Ordinarily a wrongful act such as unduly influencing a parent in the making of a will is followed by a surveillance so close that suggestion from others which might work a change is attempted to be prevented and a watchful eye and active diligence is the only practical

method of making sure the wrong will not be circumvented.

If this is a method to establish undue influence without direct proof of fraud, it seems to have failed, because undue influence cannot be made out by circumstances which, though to be expected if there was fraud, are equally consistent with its absence. Circumstances frequently justify the inference of wrong doing and just as frequently justify an inference of lack of wrong, as in this case. And when there are other circumstances where it is established that a contest of will power was entered into between the testator and his chief beneficiary and the will of the testator dominated, and controlled, it weakens the position of the contestants who allege the mind of the testator was imprisoned and under the direction and control of the chief beneficiary.

About six months after the execution of the will, the testator decided he would buy a property at Sheriff's sale and directed his son to attend to it. The project did not meet with the approval of the son and he advised against it, refused to execute the commission, whereupon the testator directed another person to attend the sale, purchase the property, and a re-sale later resulted in a profit. This incident not only shows that the mind of the testator was not dominated at that time by the son, but that his business judgment and instinct was sound, and good. On the day the minds of the testator and his son clashed over the purchase of the property, the son's mind did not control, and the testator was free to make a new will making any disposition of his property that he saw fit, and his neglect to so exercise his right to dispose of his property by last will and testament is a presumption that on that day when his mind was healthy, strong and free, he had no desire to rearrange his testamentary disposal of his estate.

The contestants assert that they have established the fact that a confidential relation existed between the testator, and his son, which is evidenced by the employment of the son in the business by the father, afterwards admitting him

by gift into partnership to the extent of one-third interest, followed by the increase of the son's portion to a half interest, placing of the title to real estate in his name, permitting a door to be established between their houses, and entrusting to his care his valuable papers; also that the testator's mind was enfeebled from the time that he suffered from a fall in the year 1906 or 1907, as shown by the testimony of his daughter, Laura Kenney, his son in law, Judson Kenney, and David Hill, and that the testator was a man of intemperate habits.

The first proposition, that a confidential relation was established between the father and the son seems to be proved, but the second proposition, that the testator's mind was enfeebled excepting such debility as could be naturally expected from age aggravated perhaps by intemperate habits, has not been established to the extent that a jury should be permitted by their verdict to set aside the will. If a will may be set aside by the declaration of a disappointed legatee, that the testator was "a changed man—he seemed to me as if he was under a dope of some kind; he took no interest in things and was not the bright, smart man he had been," "I think he was not himself; he was not normal," and the further testimony of the husband of the disappointed legatee in speaking of the accident of 1906 or 1907—"he never seemed to me to be the same man mentally after that that he was before," and "his condition was not what you would call normal," the right of a man to dispose of his property by last will and testament would be curtailed to a degree not contemplated by any law called to our attention; and if the case rested alone upon the testimony of the daughter and her husband, which is practically the only evidence of mental debility, would the granting of an issue be justified?

However, it is necessary to grant or refuse this issue upon the unconvincing testimony of the contestants, because the preponderance of testimony of a number of disinterested witnesses shows that the testator was a man of strong mind

and intellect before and at the time of the making of the will, and thereafter. The fact that he wrote the whole of the will with his right hand indicates that he was not suffering with paralysis about ten days before when he visited his daughter and an inspection of the penmanship in the will does not indicate physical weakness; and the phraseology of the will does not establish mental impairment. In fine, the facts and circumstances surrounding the writing of the will as well as the testimony of the subscribing witnesses establish conclusively the testator was normal mentally and physically on the day the will was written and signed by him, and there is practically no evidence to establish mental impairment and no testimony to prove undue influence at or before the execution of the will, and the inferences to be drawn from all the facts in the case are stronger against undue influence than in favor of it.

It is readily understandable why the testator gave from his large estate a very small bequest to his son, Fred B. Buechley. His reason for his not giving a larger benefaction to his daughter, with whom he sustained cordial relations and for whom he appeared to have natural love and affection, as well as for her children, is not clear.

The law does not require this testator to set out in his will his reasons for his several bequests, whether they be large or small, and it is unnecessary for the court to attempt to fathom his mind to ascertain the motives prompting him to make what appears to be an unnatural bequest to his daughter.

AND NOW MAY 16, 1921, an issue devisavit vel non is refused.

Estate of Thomas W. Williams**Partition - Adverse possession - Presumption of ouster.**

When an answer is filed to a petition for partition and sets up adverse possession, title and right of possession to the premises the court will direct an issue to find the facts.

Petition for Partition. O. C.

R. P. Swank, for petitioner.

J. H. Garrahan, contra.

WILHELM, P. J., July 25, 1921.

Thomas W. Williams died August 22, 1889, testate, leaving a last will and testament, wherein he bequeathed to his wife, Mary Ann Williams, her heirs and assigns all his property as long as she "will bear his name ." Upon the death of Mary Ann Williams, all his property remaining was directed to be equally divided between all of the children of Thomas W. Williams, and Mary Ann Williams; and Ann Williams, child of Thomas W. Williams, and Sophie Williams is given an equal share with all the other children of Thomas W. Williams and Mary Ann Williams, who are named in the will as Margaret Jane Williams, William Thomas Williams, Gwennie and Ruth Williams.

The will further provides that the property is to be in the hands of his beloved wife, Mary Ann, as long as she bears his name, and in case of her intermarrying again she is to take a child's share.

From the death of Thomas W. Williams, Mary Ann Williams, his widow, had possession of his real estate until the date of her re-marriage to Harry Lewis in the year 1894. After her marriage to Harry Lewis, she continued in possession of the real estate down to the time of her death, which occurred on the 18th day of October, 1919, a period of about twenty-five years.

Ann Williams, who appears to be a child of a former marriage between Thomas W. Williams and Sophie Williams,

and who by will is given an equal share with the other children of Thomas W. Williams, and Mary Ann Williams, married Lincoln Millward, became the mother of two children, who died in infancy, and Ann Millward died in the year 1894, leaving to survive her, her husband, Lincoln Millward, who claims to be a tenant by courtesy of the interest of his wife in this real estate.

Lincoln Millward has presented his petition, praying for a partition of the single piece of real estate possessed by Thomas W. Williams in his lifetime, and situate in the Borough of Mahanoy City, and secured a citation to issue requiring Gwennie Jenkins to come into court and show cause why an inquest should not be awarded according to law. It appears that Gwennie Jenkins, in the year 1920, acquired the interest of Ruth Morgan, William Williams and Margaret Jones in the said real estate by virtue of a sheriff's deed, dated October 26, 1920, upon an execution issued on a judgment, wherein the First National Bank of Frackville was the plaintiff and Ruth Morgans, Gwennie Jenkins, Williams Williams and Margaret Jones were the defendants.

No answer was filed to the citation and on March 7, 1921, an inquest in partition was awarded, and on the 16th day of April, the inquest was held and the property was appraised at \$4000.00

Before the inquest was held, to wit, on April 11, 1921, Gwennie Jenkins filed her petition praying that the inquest in partition awarded should be vacated, and set aside upon the ground that the petitioner, Lincoln Millward, has neither the possession nor the right of possession of said real estate, and that she, the respondent, claims the entire title and right of possession of the premises, and is holding the same adversely to the said Lincoln Millward and all other persons.

Testimony was taken of the answer, and it appears from the answer and the testimony that Mary Ann Williams, notwithstanding her marriage to Harry Lewis in 1894, continued in possession of the real estate; received all the rents, issues and profits accruing therefrom; occupied, used and

enjoyed the premises, paying the taxes and repairs thereon without rendering any account to the petitioner or any other person, and she continued in the enjoyment of said premises down to the time of her death, which occurred in the year 1919; and it appears that the occupancy of the premises by Mary Ann Lewis, formerly Williams, was uninterrupted and exclusive during said time; that she never made any accounting to Lincoln Millward or any other person, and that Lincoln Millward never made any demand upon her for an accounting, or for any portion of the rents, issues and profits from said real estate.

Gwennie Jenkins, therefore, asserts that the possession of Mary Ann Lewis, formerly Williams, continued uninterrupted for twenty-five years without any recognition of Lincoln Millward's title, and that said uninterrupted possession together with the receipt of the income from the real estate and the payment of taxes, and repairs are sufficient to raise a natural or legal presumption of ouster such as would defeat the right of partition in Lincoln Millward until his title to any interest in the real estate has been passed upon by jury.

On the other hand, it is asserted that the occupancy of the widow of the real estate was not adverse to her co-tenants, because she bore the name of her husband to the time of her death, therefore, was entitled to the exclusive occupancy of the premises under the terms of the will.

It appears the widow did not live with Harry Lewis for any considerable period after her marriage, and that neighbors and friends addressed her as Mary Ann Williams, and she assumed the name of Mary Ann Williams, and was known by that name generally both in a social and business way; and from these facts, it is asserted that the widow bore the name of the testator, notwithstanding her marriage to Harry Lewis, therefore, the character of her occupancy of the real estate was not changed when she re-married. This position is hardly tenable, because the testator himself in a subsequent clause in the will defines just what he means

when he says "she bears his name" by following that expression with the words "and in case of her inter-marrying again, then she is to have but a child's share," which clearly indicates that the testator intended, upon her marriage, that her enjoyment of the whole of his property should cease and her interest therein should be cut to a share equal to that of his children. It follows, therefore, the interest of this widow in the real estate was changed by her re-marriage, and her right to enjoy the whole of the property ceased with her re-marriage, and her occupancy of the whole of the property was in violation of the terms of the will, and prima facie adverse to the other parties in interest from the year 1894 to the time of her death.

It appears the court is not concluded by the respondent's claim of title by adverse possession, and it had the power to receive and look into testimony, as was done in this case, not for the purpose of determining the title of the several parties, but far enough to ascertain whether the claim of adverse and exclusive possession has any foundation in fact. The denial of tenancy in common by an heir of the decedent, on the return of the writ of partition with an assertion of title in himself by adverse possession will not be sufficient to require suspension of the proceedings, but the court may hear evidence upon the claim asserted, and if it be sufficient to justify submission to a jury, may award an issue.

In considering the sufficiency of the acts of the respondent and her predecessors in title, covering a period of twenty-one years, it appears that they raise a legal presumption or warrant an inference of ouster, and lapse of time enters largely into the question as between tenants in common. When one tenant in common is in possession, it is prima facie possession of his co-tenant, when not continued for a period of twenty-one years; but when the exclusive tenancy continues for more than twenty-one years without any recognition of title in others that possession may be sufficient to raise a legal presumption of ouster,

when all the facts are submitted to a jury. Under these circumstances, it appears that the proper proceeding in this case is to award an issue and let a jury pass upon the facts.

AND NOW JULY 25, 1921, let a decree be drawn directing an issue.

Estate of Kate Conrad

Specific performance - Proofs and allegations - Oral contract.

Where no contract for the sale of land is shown to exist there can be no decree for specific performance.

Petition for specific performance. O. C.

R. S. Bashore for petition.

Charles C. Lark, contra.

WILHELM, P. J. June 20, 1921.

This is the petition of John F. Conrad, husband of Kate Conrad, and executor of her last will and testament, praying for an order, directing a decree of specific performance of parol contract for the conveyance of land from Kate Conrad to John F. Conrad.

It is alleged in the petition that Kate Conrad was the owner of two tracts of land, situate in Valley View,, one of which was a hotel property, the place of residence of Kate Conrad and her husband, and the other a small tract of land with a dwelling house thereon erected lying along side of the hotel property, and that she contracted to sell the last mentioned piece of real estate to her husband, John F. Conrad, for the sum of Five Dollars, and love and affection, and that the contract of sale was made in the presence of a number of witnesses; that in pursuance of her intention

to sell, Kate Conrad employed George W. Huntzinger to make a survey of the lot of ground, and prepare two deeds by the first of which the said piece of land was to be conveyed by Kate Conrad and her husband, John F. Conrad to W. E. Conrad, and W. E. Conrad and wife were to execute a deed for said property to John F. Conrad, and that before the deeds were executed Kate Conrad died, and under the circumstances equity should enforce the specific execution of the contract for the sale of the land.

The difficulty standing in the way of an order for specific performance lies in the fact that the testimony of the witnesses does not support the allegations contained in the petition. The testimony of the witnesses to the alleged contract shows that it was the intention of Kate Conrad to make provision for the welfare of her husband by giving to him the property whereon was erected a two story frame dwelling house and other improvements lying aside of the hotel property, and there is no testimony to show that John F. Conrad was to pay to Kate Conrad any sum of money for the property. It follows, therefore, that there was no oral contract of sale between John F. Conrad and Kate Conrad, and if no contract of sale existed and no contract of sale having been established, it would be impossible to decree a specific performance of a contract that did not exist. The testimony goes no further than to show an intention on the part of Kate Conrad to make a gift to her husband of a certain piece of real estate; and before she was able to do that which was necessary to make the gift effective her death occurred.

There is some testimony to show that John F. Conrad entered upon the land, and made improvements, but it is not stated when he made the entry, whether before or after the death of his wife; but nearly all the improvements were made after the death of the wife according to the testimony. If a contract of sale had been established the rule that it would be unequitable to rescind a parol contract of sale because valuable improvements had been made with the con-

sent of the owner could not be invoked here, because there is no testimony to show that the improvements were made with the assent of the vendor. In fine a very short time elapsed between the date when Kate Conrad expressed her intention to give the land to her husband, John F. Conrad, and the date of her death; and during most of the time, if not all of it, she was confined to her bed with illness which finally resulted in her death.

It is established that Kate Conrad simply had intended to give to her husband a piece of land, and the gift was not legally consummated. No contract for the sale of the land has been proved. It is unfortunate, no doubt, that the intention of the wife toward her husband was not carried out in her lifetime, but we know of no law which could be invoked to enforce the execution of an intention to give which was not consummated.

AND NOW JUNE 20, 1921, the petition is dismissed.

Kuyalowicz vs. Schuylkill Gas and Electric Co.

Corporations - Merger - Acts of March 31, 1823, 2 Smith Laws 144 and May 3, 1909, P. L. 408 - April 29, 1915, P. L. 206 - April 25, 1850, P. L. 569 - May 4, 1852, P. L. 574 - Practice - Amendment.

The acts of March 31, 1823, 2 Smith Laws 144 and May 3, 1909, P. L. 408 makes a certified copy of the agreement of merger of corporations competent evidence to prove merger.

The act of April 29, 1915, P. L. 207 provides that in cases of merger all rights of creditors and all liens shall continue unimpaired, &c.

The act of April 25, 1850, P. L. 569 provides that the provisions of the act of March 27, 1713 relating to limitation of actions shall not extend to any suit against any corporation which may have suspended business or made any transfer or assignments, &c.

The act of May 4, 1852, P. L. 574 gives the court power to amend all actions by changing or adding the name or names of any party when it appears that a mistake has been made.

Rule to quash writ and to amend. No. 36, January Term, 1921.

Z. F. Rynkiewicz and A. D. Knittle, for plaintiff.

M. M. Burke and Thomas J. Perkins, for defendant.

KOCH, J. July 25, 1921.

The petition of the defendant, as a basis for quashing the writ in this case, assigns four reasons, to wit:-

"(1). The above named defendant was not at the commencement of this suit, and is not now, located or doing business in the borough of Shenandoah, Schuylkill County, Pa.

"(2). There was not in existence at the commencement of this suit, and is not now in existence, any such corporation as that named in the writ as defendant, namely. The Schuylkill Gas and Electric Company."

"(3). The return of service by the sheriff of summons issued in this suit, as follows: "Served the within writ on the Schuylkill Gas and Electric Company, a corporation, at its office in the borough of Shenandoah, by handing a true and attested copy of said writ to P. A. McCarron, Supt. of said Schuylkill Gas and Electric Company and then in charge of said office and making known to him the contents thereof personally on Nov. 23, 1920. It having first been ascertained upon inquiry that none of the executive officers of said company reside in Schuylkill County,' is not in truth and fact correct, in this; that the said the Schuylkill Gas and Electric Company was not, at the time of the commencement of said suit or at the time said service was made in existence and that the said P. A. McCarron named in said return as served, was not then superintendent of the said the Schuylkill Gas and Electric Company, the defendant above named.

"(4). At the time of the commencement of said suit and at the time of said service above named defendant was not in law or in fact in existence in that it had some time prior thereto, to wit, on June 4, 1920, been merged with The Lehigh Valley Light and Power Company, Northern Central

Gas Company, Columbia and Montour Electric Company, Northumberland County Gas & Electric Company, The Harwood Electric Company, Pennsylvania Power and Light Company and Pennsylvania Lighting Company to form Pennsylvania Power and Light Company, a corporation as appears by joint agreement of consolidation and merger between the aforesaid companies creating the said Pennsylvania Power and Light Company dated April 12, 1920, filed in the office of the Secretary of the Commonwealth on the 2nd day of June, A. D., 1920, and letters patent duly issued thereon by the Governor under date of June 4, 1920."

The said P. A. McCarron made affidavit to said petition, and therein states, "that for some time and up to its merger on June 3, 1920 he was superintendent of the Schuylkill Gas and Electric Company," etc.

In answer to the rule, Joseph Kuyalowicz denies the averments in the first paragraph above quoted and avers, "That the Schuylkill Gas and Electric Company is a corporation doing business in the borough of Shenandoah," etc. He denies the averments set out in the second paragraph of the petition and avers, "That the Schuylkill Gas and Electric Company's charter is on file in the office of the Recorder of Schuylkill County, and under the law had corporate existence the day that suit was commenced." He denies the facts set forth in petitioner's third paragraph and avers, "That the said P. A. McCarron named in the sheriff's return was, at the time of the injury inflicted forming the basis of the named suit, the superintendent of the Schuylkill Gas and Electric Company." He further denies the averments in petitioner's fourth paragraph and says, "That the charter of the Pennsylvania Heat and Light Company was not recorded in the office of the Recorder of Deeds in and for Schuylkill County. That the plaintiff has no knowledge that the Schuylkill Gas and Electric Company had consolidated or merged with any one or more companies to form the Pennsylvania Heat and Light Company. That if such consolidation was in fact intended, the plaintiffs had

no knowledge of the same, because on the date of entry of suit as above and up to and including the 14th day of January, 1921 no charter of the Pennsylvania Heat and Light Company was recorded in the office of the Recorder of Deeds of Schuylkill County."

For further answer to the petition Kuyalowicz says:-

"First.- That upon the date of the negligent act which forms the basis of the said suit, the Schuylkill Gas and Electric Company was in existence and that thereupon the right of action accrued against it, and that the law regulating the formation and control of corporations provides that it shall continue its legal existence for the purpose of preserving the right of action or debt.

"Second:- That no act of incorporation or consolidation or merger of corporations under the law is completed until the charter has been recorded in the office of the county wherein it is sought to transact the principal business.

"Third:- The petitioner's motion and rule to quash is defective and not in accordance with the Practice Act Nineteen fifteen.

"Fourth:- The non-existence of the defendant is not a reason to quash and is a matter of substantive defense."

Testimony was taken in open court on the part of both sides in support of, and against, the said rule. At the beginning thereof the defendant offered the writ to show the return of service thereto and the plaintiff objected "on the ground that the defendant has proceeded in an improper way to attack the service of the writ," saying that "The act of 1915 has abolished all pleas in abatement and all such matters, such as this, intended to attack the writ must be raised in an affidavit of defense, raising principles of law."

Before discussing the law of this rule, we will state the facts developed by the testimony. The endorsement of the service on the writ is as follows:- "Served the within writ on the Schuylkill Gas and Electric Company, a corporation of Shenandoah, Pa., at its office in the borough of Shenan-

doah, Schuylkill County, Pa., by handing a true and attested copy of said writ to P. A. McCarron, district manager of said Schuylkill Gas and Electric Company and then in charge of said office and making known to him the contents thereof personally on November 23, 1920. It having been ascertained upon inquiry that none of the executive officers of said company reside in Schuylkill County. So answers. Joseph Wyatt, Sheriff."

P. A. McCarron testified that, when the writ was served on him he was not in the employ of the Schuylkill Gas and Electric Company and that the said company then had no office in Shenandoah or any where else, to his knowledge; also that he was at that time in the employ of Pennsylvania Power and Light Company and that he was served with the writ in its office in Shenandoah. He testified on cross-examination that the Schuylkill Gas and Electric Company was in existence in November, 1919 (the time of the accident), and that he was then its district manager with his office in the borough of Shenandoah; that his duties in the merged company are somewhat enlarged and that the bills are sent out in the name of Pennsylvania Power and Light Company. The assistant secretary of the Pennsylvania Power and Light Company testified that the company's main office is in Allentown, Pa., and that the Schuylkill Gas and Electric Company, the defendant in this case, was one of the merging companies making up the Pennsylvania Power and Light Company. The copy of Agreement of Merger and Consolidation by and between the several companies forming "The Pennsylvania Power and Light Company" certified by the Secretary of the Commonwealth and also the letters patent of the Pennsylvania Power and Light Company were received in support of the rule, but against the plaintiff's objection on the ground that the originals were not recorded in Schuylkill County, and that a certified copy cannot be received in evidence. Plaintiff proved that neither the agreement of merger and consolidation nor the letters patent are recorded in Schuylkill County.

The agreement of consolidation and merger is dated April 12, 1920, the letters patent are dated June 4th, 1920, whereas the writ was issued in this case on the 10th of November, 1920 and service made on the 23rd of November, 1920.

The certified copy of the agreement of merger and consolidation is admissible and made competent as evidence by the provisions of the act of 31st. March, 1823, 8 Smith Laws, 144 (2 Purd. 1509, plac. 77), and by the fourth section of the Act of May 3rd, 1909, P. L. 408 (5 Purd. 5704, plac. 27). Nor do I find anything in the statutory law of this state which requires that a joint agreement of consolidation and merger of two or more merging companies and the letters patent which issue therefor must be recorded in each county where the respective constituent companies theretofore chiefly carried on their respective operations. By the provisions of the general corporation act of 29th April, 1874, P. L. 75, each corporation thereinunder incorporated by the Governor of the Commonwealth is required to record its "original certificate with all its endorsements, ***** in the office for the recording of deeds in and for the county where the chief operations are to be carried on, and from thenceforth the subscribers thereto, and their associates and successors, shall be a corporation for the purposes and upon the terms named in said charter." But when corporations of the second class have been created in accordance with law and then become merged by virtue of the provisions of an act, entitled "An Act authorizing the merger and consolidation of certain corporations," approved the 3rd day of May, 1909, P. L., 408 and its supplements, the certificate of agreement of the merging corporations and the letters patent for the merged companies are not required to be recorded in the respective counties where each of the several merging corporations chiefly carried on its business theretofore. In the third section of the said Act of 1909, as amended on the 29th of April, 1915, P. L., 206, it is provided that, "Upon the filing of said certificates and agreement, or copy of

agreement, in the office of the Secretary of the Commonwealth, and upon the issuing of new letters patent thereon by the governor, the said merger shall be deemed to have taken place, and the said corporations to be one corporation under the name adopted in and by said agreement, possessing all the rights, privileges, and franchises theretofore vested in each of them; and all the estate and property, real and personal, and rights of action, of each of said corporations, shall be deemed and taken to be transferred to and vested in said new corporation, without any further act or deed." Since no further act or deed is necessary, recording of the agreement of consolidation and the letters patent is not required.

It being evident that a misnomer exists in this case, the defendant's remedy at common law would have been by a plea in abatement, but now, since pleas in abatement are abolished by the "Practice Act Nineteen Fifteen" P. L. 483, such defense must be made in an affidavit of defense. However, defense in that manner is not necessarily exclusive. Rules in Pennsylvania have become of enlarged operation and have been allowed where at common law a plea in abatement would have been the only remedy. In *Parke Bros. & Co., v. Oil Company Boiler Works*, 204 Pa., 453, 457, the Supreme Court, in speaking of rules, said that, "***** the constant tendency of modern practice has been to enlarge rather than to restrict their operation." Again, "The practice of setting aside service on rule has the sanction of precedents sufficient to save it from being pronounced irregular in cases where it reaches the desired end without inconvenience or injustice to either party. See *Parke v. Commonwealth Ins. Co.*, 44 Pa. 422; *Hagerman v. Empire Slate Co.*, 97 Pa. 534; *Hawn v. Penna. Canal Co.*, 154 Pa. 455; *Fulton v. Commercial Travelers Accident Asso.*, 172 Pa., 117; *Baily v. Williamsport, etc. R. R. Co.*, 174 Pa. 114; *Platt v. Belsena Coal Mining Company*, 191 Pa. 215, and *Jensen v. Phila. & S. Ry. Co.*, 201 Pa. 603." Therefore, we conclude that the defendant has not mistaken its remedy

here.

That the Schuylkill Gas and Electric Company became merged with other corporations to form the Pennsylvania Power and Light Company on the 12th. of April, 1920, for which letters patent were issued on the 4th. of June, 1920, is beyond question. Such merger ipso facto dissolved the Schuylkill Gas and Electric Company and made it non-existent. Therefore, it became no longer suable after the 4th of June, 1920; and the issuance of the writ in this case on the 10th of November, 1920 was improper, because there was no one who could be served with the writ; *Dalmas v. Phillipsburg & S. Val. R. R. Co.*, 254 Pa. 9. But the plaintiffs were not without ample remedy after the merger, because merger acts always provide for such contingencies. In this case the act approved 29th April, 1915, P. L. 207, which is amendatory of an act entitled "An Act authorizing the merger and consolidation of certain corporations" approved the 3rd day of May, one thousand nine hundred and nine, applies. It, inter alia, provides that in cases of merger, "**** all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, limited in lien to the property affected by such liens at the time of the creation of the same, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts, not of record, duties, and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties, and liabilities had been contracted by it." What we have thus far said indicates that the rule should be made absolute and the writ quashed.

But, since the hearing and argument upon the rule to quash, the plaintiffs have filed a petition asking us "to amend the praecipe, the summons, the writ and all other parts of the record *** by adding thereto the name of the Pennsylvania Power and Light Company, a corporation, and, if necessary, to order new service of the said subpoena and

writ and the issuance of an alias writ and service thereon." When the petition was presented in open court, counsel who appear de bene esse in this case made objection thereto and argument was immediately heard on the part of both sides. The plaintiffs have not yet filed a statement of their claim, but from their petition for amendment we learn that they sue as the surviving and dependent parents of Andrew Kuyalowicz, deceased, who was electrocuted when working for the Schuylkill Gas and Electric Company on or about the 15th day of November, 1919. The petition further sets forth that this action was begun within a year from the date of Andrew's death. We quote from the petition the following as explanatory of the reason for bringing this action against the Schuylkill Gas and Electric Company, to wit:-

"That at the time of commencement of said action the plaintiffs, as a matter of fact and law, mistakenly believed that the Schuylkill Gas and Electric Company was in existence, such belief being founded upon the following facts:-

'A. The defendant and his attorneys negotiated with an agent for the settlement of the claim for damages arising from the negligence of the defendant, said agent in all negotiations never disclosing to the plaintiffs or their attorney that the Schuylkill Gas and Electric Company had gone out of existence.

'B. The merger of the Schuylkill Gas and Electric Company was not recorded in the office of the Recorder of Deeds of Schuylkill County.

'C. The office of the Schuylkill Gas and Electric Company at the date of the injury was identically the same as that of the merged company at the time of bringing suit.

'D. The officers in charge of the Schuylkill Gas and Electric Company at the date of the injury occupied the same office at the date of bringing suit.

'E. The name of the Schuylkill Gas and Electric Company was the name entered in the directory of the Bell Telephone Company and the United Telephone and Tele-

graph Company at the date of bringing suit and all telephone calls were made in that name."

In the petition "The plaintiffs further allege that they have no knowledge, either actual or constructive, that the Schuylkill Gas and Electric Company had lost its existence by merger with any other companies." The sixth paragraph of the petition is as follows:- "That the writ issued in the above stated case to No. 36 January Term, 1921, was served upon P. A. McCarron, who, at the time of the death of Andrew Kuyalowicz, was the district manager of the Schuylkill Gas and Electric Company and at the time of the service of said writ occupied the same office and still had charge of the operation of the plant formerly held by the Schuylkill Gas and Electric Company."

It is apparent that if the writ in this case be quashed the plaintiffs will be barred from suit by the statute of limitations. The seventh section of the act of 25th April, 1850, P. L. 569, provides "That the provisions of an act passed the 27th of March, 1713 entitled 'An Act for the limitation of actions' shall not hereafter extend to any suit against any corporation or body politic which may have suspended business, or made any transfer or assignment in trust for creditors, or who may have at the time and after the accruing of the cause of action, in any manner ceased from or suspended the ordinary business for which said corporation was created." But it is now of no avail; *Gallagher v. Silver Brook Coal Company*, 10 Schuylkill *Legislative Record* 247. Now, as the right of action in these plaintiffs is barred by the statute of limitations, may they be allowed to amend the record in the manner prayed for. The second section of the act of 4th May, 1852, P. L., 574, 1 *Purd.* 311, plac. 3, provides that, "All actions pending or hereafter to be brought, in the several courts of this commonwealth, and in all cases of judgments entered by confession, the said court shall have power in any stage of the proceedings to permit amendments by changing or adding the name or names of any party, defendant or plaintiff,

whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party." It must be clear now that from what proceeds in this case that a "mistake ** has been made in the name" of the real defendant in this case. In the case of Heidelberg School District v. Horst, 62 Pa. 301, Horst sued the said school district to recover Eight hundred dollars which he had lent to it in 1865 to pay bounties to persons volunteering in the military and naval service of the United States. An act entitled "An Act relating to the payment of bounties for volunteers in the County of Lebanon," approved the 24th day of August, 1864, P. L. 1001, legalized, made valid and binding upon the respective boroughs and townships in Lebanon County "all bonds, warrants or certificates of indebtedness, issued or to be issued by the corporate authorities of any borough, or by the school directors, supervisors, or board of election officers of any township *** for the payment of bounties to persons volunteering in the military or naval service of the United States." It will be noted that whilst the school district could create the debt, the debt became binding not upon the school district but upon the township, and, that as the liability was thus fastened on the township, it became necessary for Horst to sue the township of Heidelberg instead of the school district. The defendant, therefore, made a point of this fact in its requests for the court's instructions in its charge to the jury. The narr had two counts, the first count was based on the bond which had been signed by all the school directors, and the second count was based on money lent to the school district. In charging the jury, Pearson, P. J., inter alia, said, "The plaintiff would be entitled to recover on the second count of the narr, and the record can be so amended as to make the action against Heidelberg township instead of the school directors thereof. It is an amendment of mere form and will be permitted by the court, and the record may be treated as amended." In affirming the judgment of the court below, the Supreme Court, per Agnew, J., inter

alia said, "This is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed, and we think the corrective power of the court is sufficient to prevent it. The president judge of the court below struck at the root of the chief objection when he said he would treat the action as amended, and as now in the name of the township of Heidelberg. He had abundant evidence before him to justify the amendment, and ample authority also to be found in the following cases: *Barnet v. School Directors*, 6 W. & S. 48; *Prescott v. Burgess, &c.*, of Duquesne, 12 Wright 118; *Robertson & Co., v. Reed*, 11 Id. 115; *Barnhill v. Haigh*, 8 P. F. Smith, 165. If not entered on the record and if necessary, the amendment can yet be made."

After the writer had read the case just referred to in the course of an examination of the rule now pending, he withheld disposing of the rule and asked counsel on both sides, in view of the last cited decision, to argue the question of this court's duty under the circumstances of this case - whether or not we should first amend the record so as to correct the plaintiff's mistake and then dispose of the rule. Argument was had pursuant to the suggestion, but before the argument began the plaintiff's counsel presented the plaintiffs' petition to amend. The defendant's counsel had previously received a copy of the petition and were prepared to argue against it, filing with their argument a well prepared, lengthy brief. We will, therefore, proceed further to consider the plaintiffs' petition at this time.

I will state the case of *Wright v. Eureka Tempered Copper Company*, 206 Pa., 274 in the language of the Supreme Court, to wit:-

"The Eureka Tempered Copper Company is a corporation that was engaged for a number of years in business in North East, Erie County. Its property was sold by the sheriff in 1896, and since then it has not done any business, but still exists as a corporation. In December, 1896, the Eureka Tempered Copper Works was chartered, and this corporation succeeded to the business of the copper com-

pany. In 1899, the plaintiff while in the employ of the copper works was injured, and in 1901, three days before his right of action was barred by the statute of limitations, he brought this suit to recover damages. Through a mistake of counsel the defendant named in the writ was the copper company instead of the copper works. The service of the writ was made on the manager of the latter corporation, but the sheriff, following the words of the writ, returned it as served on the manager of the copper company. The error in the name was not discovered by the plaintiff until a few days after the statute of limitations had barred a new action. The plaintiff then obtained a rule to show cause why the record should not be amended by striking out the word "Company" and inserting the word "Works," and on the same day the sheriff petitioned for leave to amend his return so as to show service on the manager of the copper works." The court below discharged the rule to amend and dismissed the sheriff's petition. Therefore, an appeal was taken and the judgment of the court below reversed with a procedendo. The Supreme Court said, "Statutes of amendment are liberally construed to give affect to their clearly defined intent to prevent a defeat of justice through a mere mistake as to parties or the form of action. Amendments however will not be allowed to the prejudice of the other party, where the statute of limitations has run, by introducing a new cause of action or bringing in a new party or changing the capacity in which he is sued: *Trego v. Lewis*, 33 Pa. 463; *Commonwealth ex rel. v. Dillon*, 81, Pa. 41; *Grier v. Northern Assurance Co.* 183 Pa. 334; *Peterson v. Delaware River Ferry Co.*, 190 Pa., 364; *Garmon v. Glass*, 197 Pa. 101. A party whose name it is asked to amend must be in court. If the effect of the amendment will be to correct the name under which the right party was sued, it should be allowed; if its effect will be to bring a new party on the record, it should be refused after the running of the statute of limitations." The Supreme Court filed its opinion May 18, 1903. Therefore, by its action,

the plaintiff was permitted to amend more than one year after the statute of limitations barred the action. As in that case, so in this, there can be no doubt that the plaintiffs intended to bring suit against the right party, but they made a mistake in naming the right party, and that was a mistake both of law and of fact. A court has the power to correct a mistake of law or fact. *Druckenmiller v. Young*, 27 Pa. 971; *Cochran v. Arnold*, 58 Pa. 399; *Pennsylvania Railroad Company v. Keller*, 67 Pa. 300; *Leonard v. Parker*, 72 Pa. 236; *Heslop v. Heslop*, 82 Pa. 537; *Holmes v. Pennsylvania R. R. Co.*, 220 Pa. 189, 192. In this case the right party was served, to wit, P. J. McCarron, the manager of the Pennsylvania Power and Light Company at the company's place of business. We can here say as the Supreme Court said in the *Copper Company* case: "The mistake in bringing the suit was in the name of the party actually summoned and not in suing the wrong party, ****, because there was no party by the name of Schuylkill Gas and Electric Company in existence. That company died upon its merger with other corporations, and it became impossible to sue it. By making service on McCarron the right defendant was brought into court under the wrong name. Therefore, the party whose name it is asked to amend is in court, and, as the mistake is clear, the amendment should be allowed and the rule to quash the writ discharged. The plaintiffs and their counsel intended to sue the party who is liable to the plaintiff and that party is now, and was at the time of suing, the Pennsylvania Power and Light Company. I think the Power and Light Company is privy to the Gas and Electric Company, for the former clearly succeeds the latter and stands in its stead so far as the liabilities of the latter are concerned. It has become sponsor for the Gas and Electric Company as to all its obligations and liabilities, both by virtue of the agreement of merger and by virtue of the statutory law of this state. Therefore, I think the effect of the amendment in this case is to correct the name under which the right party was sued. It is true

that the Power and Light Company is a new corporation, but it must not be overlooked that this new corporation is bound by the agreement under which it became formed and that by virtue thereof it stands in the place of and for all its several constituent parts.

In *McGinnis v. Valvoline Oil Works*, 251 Pa. 407, the plaintiff was injured on the 19th of March, 1911, and brought suit to recover damages from his employer, naming it as "The Valvoline Oil Works, Limited, a corporation." More than three and one-half years afterwards the plaintiff learned that the defendant was a partnership association and not a corporation and moved for leave to amend by striking from its name the words "a corporation" and adding in their stead the words "a partnership association." The court below refused the amendment. Service of the writ had been accepted by the attorneys for "The Valvoline Oil Works, Limited" for whom the plaintiff worked and in whose services he was injured, and at that time said attorneys also represented a corporation named "The Valvoline Oil Company," with whom the plaintiff had no connection. The supreme court on the 6th of January, 1916 reversed the court below and allowed the amendment to be made, notwithstanding the statute of limitations had then barred the right of action by nearly three years, because service had been made upon the right party but under the wrong name.

AND NOW JULY 25, 1921, the rule to quash is discharged and the plaintiff is permitted to amend by naming the defendant as "Pennsylvania Power and Light Company" and by striking from the record the name "The Schuylkill Gas and Electric Company, a corporation of Shenandoah."

Blew vs. Phillips - Jones Co.

Appeal from justice - Practice - Counterclaim - Common carrier - Negligence.

In appeals from a justice of the peace the pleadings must conform to the Practice Act of 1915, unless the parties agree in writing to proceed on the transcript.

If, upon the trial of an appeal from the judgment of a justice of the peace, the cause is tried upon its merits without regard to the fact that the defendant's set-off exceeds \$300, it is too late after verdict in favor of the plaintiff, to raise the question that the set-off exceeded the jurisdiction of the justice.

A carrier, either private or public, is responsible for a loss resulting from delivery to the wrong person.

Ordinarily, a drayman who hauls or drays indiscriminately for all persons hiring him, is liable for the loss of goods entrusted to his care as a bailee for hire, and not as a common carrier.

The non-delivery of goods entrusted by a bailor to a bailee for hire, with instructions to deliver to a certain person, casts upon the bailee the mere duty of explaining the loss of the goods, and such proof when made, shifts to the bailor the duty of establishing negligence on the part of the bailee in order to entitle him to recover the goods not delivered.

Motion for new trial. No. 186, May Term, 1919.

A. D. Knittle, for motion.

J. L. Stauffer, contra.

BERGER, J. April 11, 1921.

The plaintiff was engaged in the business of hauling and draying. He brought an action before a justice of the peace and recovered judgment against the defendant, from which it appealed. On such appeals our rule of court provides, unless the parties agree in writing to proceed on the transcript, that the pleadings shall conform with the Practice Act, nineteen fifteen. The plaintiff averred in his statement of claim that he had entered into an oral contract with the defendant to haul all goods consigned to it at the freight depots of the Philadelphia & Reading Railway Company and of the Pennsylvania Railroad Company in Pottsville to its factory on Mauch Chunk Street and to haul from the factory to the said freight stations the goods manufactured for shipment,

at the price per case, package or parcel, set out in the statement. The amount alleged to be due and owing, inclusive of \$28.02 for freight paid by the plaintiff for the defendant, was \$246.12, with interest from January 31, 1919. The defendant, in its affidavit of defense, admitted all the allegations contained in the statement of the plaintiff, and made an averment of a counterclaim in the sum of \$576.48, to which the plaintiff made reply on the merits. The case proceeded to trial without objection to the jurisdiction of the court on the ground that the counterclaim exceeded three hundred dollars, the maximum amount of which the justice had jurisdiction, and the jury rendered a verdict for the plaintiff for the full amount of his claim. It is now too late to consider the question of the court's jurisdiction of the counterclaim: *O'Ferrall v. Moore*, 127 Pa. 234.

The defendant's counterclaim arises out of an alleged breach of the oral contract sued upon by the plaintiff, whereby it became the duty of the plaintiff to receive at the freight depot of the Pennsylvania Railroad Company certain cases of goods consigned by the Milville Manufacturing Company of Milville, New Jersey, to the defendant, and to deliver them to its factory on Mauch Chunk Street. The defendant avers that the plaintiff, on or about May 31, 1918, received one case of goods marked with the number 38,139 of the value of \$576.68 and "neglected, utterly failed to deliver the said case of goods" whereby the defendant "sustained a loss through the breach of contract of the said C. A. Blew (the plaintiff) to the amount of five hundred and seventy-six dollars and sixty-eight cents (\$578.68)." The plaintiff in his reply averred that he did make safe delivery of the case of goods in question to the defendant's factory on Mauch Chunk Street, and that the defendant therefore had sustained no loss.

The only issue of fact for determination arises out of the defendant's counterclaim. It presented its claim upon the theory that the plaintiff was a common carrier and there-

fore liable to an insurer of the case of goods in question. The plaintiff's contention was that he was a mere private carrier for hire and liable only in case it was established by the weight and fair preponderance of the evidence that the case of goods was lost through want of ordinary care on his part. Two kinds of carriers for hire are recognized in law. The measure of their duty is thus stated: "There are two kinds of carriers for hire recognized by law. The one, designated as private, the other, public or common carriers. The former are bound to use ordinary diligence, that is, such diligence as every prudent man usually takes of his own goods under the like circumstances, and are consequently only responsible for losses resulting from ordinary negligence. The latter are in general liable to answer for all losses, except those occasioned by the act of God, or of the public enemies:" *Verner et al. v. Sweitzer*, 32 Pa. 208, 212. And whether a carrier be a common or a private carrier "he must take care at his peril that the goods are delivered to the right person, for a delivery to a wrong person renders him clearly responsible:" *Shenk et al. v. The Philadelphia Steam Propeller Company*, 60 Pa. 109. The burden upon a bailor, when he seeks to recover for the loss or damage of his goods in the hands of a bailee, was defined by Moschzisker, J., in *Kunz v. Balzereit*, 18 D. R. 419, when sitting upon the Common Pleas in Philadelphia, in this manner: "The general rule in Pennsylvania is: With certain exceptions as to innkeepers and common carriers, the burden of proof of negligence is upon the bailor, and proof merely of the loss is not sufficient to put the bailee on his defence. The strict rule of the civil law, that the bailee must always acquit himself, has not been adopted in our state. When the bailee, at the time of the loss, gives an account of the cause and occasion of the injury sufficient to give plaintiff a chance to investigate, although it may be only a general account, if it does not in itself show negligence on the part of the bailee, it devolves on the bailor to prove negligence: *Logan v. Mathews*, 6 Pa. 417; *Farnham v. Cam-*

den & Amboy R. R. Co., 55 Pa. 53. In *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. 577, we have a case where a horse was shipped in a car under contract specially relieving the carrier from loss except through negligence. The horse died in transit. There was no proof from the plaintiff of the cause of death. It was held that no presumption of negligence arose from the fact of loss and that the plaintiff was not entitled to recover. "***** In *Frank Bros. & Co. v. Railroad Co.*, 9 Pa. Superior Ct. 129, 135, Orlady, J., said: "Where there is proof of the fact of the injury and the manner of its occurrence under circumstances which do not impute negligence to the defendant, there is no liability of the carrier, whose contract was for a limited liability only, except upon proof of negligence as an inducing cause of the injury and the burden of making such proof is upon the plaintiff: *Farnham v. Camden & Amboy R. R. Co.*, 55 Pa. 53; *Patterson v. Clyde*, 67 Pa. 500; *Buck v. Penna. R. Co.*, 150 Pa. 170."

The defendant, in its statement of counterclaim, did not allege that the plaintiff is a common carrier, and the court held that there is no evidence to show that he is. After the introduction of evidence tending to establish the receipt of the case of goods by the plaintiff and his failure to deliver it at its factory, the defendant rested its counterclaim. In defense the plaintiff testified that he delivered the case of goods on or before May 31, 1918, at the warehouse floor of the defendant's factory, of which John Graney had charge; that he took no receipt for the delivery of any goods during a period of nine years in which his contract was in force; that he at times had made deliveries on the warehouse floor when none of the defendant's employees were present to receive the goods; and that he only kept a record of the number of parcels or cases hauled without noting the identifying numbers upon the packages.

To rebut the testimony of the plaintiff, John Graney testified that he was in charge of the defendant's receipts and shipments. He had no personal knowledge of the de-

livery of case No. 38139, but his record does not show its delivery. He kept a receiving book in which he entered the numbers upon the case received. He was assisted by Harry Hillibush, who received the goods in his absence. Each was on duty a part of the day on May 31st. The bookkeeper reported the shortage of case No. 38139 to him. He, and two other of the defendant's employees, made a thorough search of the building, but failed to find it. Hillibush testified that he assisted Graney. He entered the case numbers in the receiving book after the goods had been received on the warehouse floor, and that this was done sometimes in the absence of Blew, after he had made the deliveries. He said case No. 38139 was not delivered.

Helen Betz, the defendant's bookkeeper, testified that she received the invoices of shipments made to Pottsville, from the defendant's main office in New York, and made a record from them of the goods consigned to it. She discovered the alleged non-delivery of case No. 38139 on June 6, 1918, by checking the record of the invoice for this case, as was her practice, against the record made by Graney and Hillibush of the goods delivered at the defendant's warehouse by the plaintiff. When the plaintiff's attention was directed to the shortage of the case of goods he said. "All right. I will get it." After the plaintiff had made inquiry at the Pennsylvania Railroad freight depot he reported that he had made delivery of the case of goods. The plaintiff's bills for hauling were presented monthly and consisted merely of a statement of the number of parcels or cases hauled, without a specification of the particular days of the month on which they were hauled, and she checked his bills against her record made from the invoices. His bills were always incorrect. The invoice for case No. 38139 was received at Pottsville May 17, 1918, and the case of goods was not received at the freight depot until May 27, 1918. As late as July 18, 1918, she wrote to the agent of the Pennsylvania Railroad Company at Pottsville requesting that a tracer be started for this case of goods.

Mr. Biever, the defendant's manager, and Mr. Templin the foreman in full charge of its cutting department, in order to show that this case of goods had not been cut up without a record of it having been made, testified, as experts, that they knew the number of garments that would be produced from a given yardage of goods, and that the production record of the factory did not show an excess of production according to the record kept of the yardage cut and passing through the cutting room from May 31st to June 5th or 6th, in which period the case must have been lost or mislaid if the plaintiff had made delivery of it.

The trial judge, after having charged the jury respecting the measure of care which the plaintiff was obliged to exercise as an ordinary bailee for hire, said: "But before you come to the consideration of negligence in this case, under the principle just stated to you, you must determine this: The defense of Mr. Blew in this case to the set off is not merely the allegation that the Phillips-Jones Company has not established negligence, but he has testified that he has actually made delivery of case 38139. The burden is upon the Phillips-Jones Company, in order to charge him with the value of this case, to show by the weight and the fair preponderance of the evidence that he did not make delivery of that case. Mr. Blew admits that he received the case, but he says that he made delivery of it. If you believe Mr. Blew, if you believe from the evidence that he did make delivery of it, that would be the end of the case, and he would be entitled to your verdict. If, upon the other hand, the Phillips-Jones Company, through the numerous witnesses which they have called, have satisfied you, by the weight and the fair preponderance of the evidence, that he did not make delivery of that case, then you will proceed to determine whether his failure to deliver it was due to negligence or not. And if the Phillips-Jones Company, in addition to satisfying you by the weight and fair preponderance of the evidence of the non-delivery, also satisfy you by the weight and fair preponderance of the evidence,

of Mr. Blew's negligence, then their case of set-off is made out, and the verdict would have to be in their favor for approximately \$330.00.

"Now, what is the evidence in this case showing negligence on the part of Mr. Blew? The Pennsylvania Railroad Company clerks say they delivered the case to him. He admits he received it. He says he delivered it. Assuming now, that you find from the weight and fair preponderance of the evidence that he did not deliver it, where is the evidence of negligence? Mr. Knittle has called our attention to an authority which says that the failure to deliver, of a carrier, whether a common carrier, or such a carrier as Mr. Blew is, is itself evidence of negligence. If, then, you would conclude from the weight and the fair preponderance of the evidence that there was no delivery made by Mr. Blew, the fact of your finding of non-delivery would be some evidence of negligence on Mr. Blew's part. But it is not conclusive, as we view it, in this case, because in determining whether the non-delivery - - should you find that such was the fact - - occurred through his default, why did it occur? What caused it to occur? Where is the evidence which shows what caused it to occur? I know of none. Is the cause of the non-delivery by reason of a discrepancy in accounting? Was the case possibly taken from the warehouse of the Phillips-Jones Company? May it have passed through the mill, notwithstanding the testimony of Mr. Biever and of the foreman of the cutting room, without showing any increased production. These, then, are all matters which you must take into consideration. If you find that Mr. Blew made delivery of this case of goods, then your verdict must be in his favor, for the full amount. If you find that he failed to make delivery of the case, and that it is due to his neglect, and that that neglect has been shown in the manner pointed out by the law, which I have stated to you, by the fair preponderance of the evidence, then the set-off is made out and you will set off the Phillips-Jones claim against his."

Woodruff v. Painter & Elridge, 150 Pa. 91, is an appeal from a refusal to take off a compulsory nonsuit, where the plaintiff while trying on a coat and vest in the defendant's store, at the request of the latter's salesman, placed his watch in a drawer from which the vest had been taken and while he and the salesman were in another part of the store the watch disappeared. The defendant refused to compensate the plaintiff for the loss of his watch and he brought suit to recover its value. In reversing the judgment of the court below Heydrick, J., said: "But the plaintiff's evidence amounts to no more than that the salesman examined the drawer in which the watch had been placed and some others and did not find it, and that several persons not employees of the defendants who had been in the store and left were sent for and interrogated without result. All this did not prove a loss, nor even that the defendants said the watch was lost or had been stolen. In Logan v. Mathews, 6 Pa. 417, it was held that if a bailee for hire return the property in a damaged state and give no explanation how the injury happened, the burden of proof to show that there was no negligence is upon him. In harmony with this judgment, a bailee who fails to give any such explanation of his neglect to restore the property entrusted to him as will enable the bailor to test his good faith ought to be held to proof that he has exercised ordinary diligence in the care of it. Doubtless the defendants were entitled to the benefit of any inferences fairly deducible from their conduct when the watch was demanded, but such inferences were for the jury. If the case had been submitted to them and they had found as an inference from the facts proved that the watch had been stolen such finding would have been a complete exculpation, unless they farther found that the defendants had not exercised ordinary care."

In Hoyt v. Clinton Hotel Co., Appellant, 35 Pa. Superior Ct. 297, cited by the defendant, the plaintiff, who was a resident of the hotel, left a trunk with the defendant for storage under a contract of bailment, which made the de-

defendant liable only for loss through failure to exercise ordinary care. When the plaintiff called for his trunk it could not be found and "its disappearance was not accounted for by the manager of the hotel, nor was any evidence introduced (at the trial) tending to explain its loss." Under these circumstances Henderson, J., said (299): "An unexplained loss of the property in the hands of the bailee gives rise to a presumption of negligence where such bailment exists and the bailee is liable for failure to exercise ordinary care."

***** In *Safe Deposit Co. v. Pollock*, 85 Pa. 391, Pollock had deposited some government bonds with the company in a safe rented from it under a contract in which its liability for safe keeping was qualified and restricted (1) to keeping proper guard and watch over the safe; (2) to the prevention of access to the safe by any other person than the renter; and (3) to the protection of the renters safe from the dishonesty of its employees. The bonds were taken from the box by some unauthorized person, and it was held that the circumstances under which the bonds had been taken shifted the burden of proof from Pollock to the Safe Deposit Company and upon its facts the case was distinguished from those in which mere proof of loss was insufficient to put the bailee on his defense.

The defendant's counterclaim is founded upon an allegation of negligence arising out of a failure to deliver the case of goods in question. The actual loss of the goods is not alleged, and no positive or direct evidence was introduced at the trial to show its loss or the manner in which it occurred. Delivery to a wrong person was neither alleged nor proved, and the defendant in the course of the trial expressly disclaimed any intent to charge the plaintiff with an appropriation of the missing case of goods to his own use. The plaintiff, when notified that the case of goods was missing, explained that he had delivered it to the defendant's factory. What actually became of it is a mystery.

The burden of proof was upon the defendant to establish its counterclaim because it maintained the affirmative

upon the issue arising out of that claim. In speaking of the burden resting upon a suitor who sets up an affirmative defense, Moschzisker, J. in *Suravitz v. Prudential Ins. Co.*, Appellant, 261 Pa. 390, at page 400, said: "The burden of establishing facts by such character of proofs as the law demands, and the weight of the evidence, always rests upon the party asserting them; although, as to the necessity for producing evidence, the burden of proof may shift from time to time in the course of trial. When the proofs are all in, and the case is ripe for determination, it becomes a matter of weighing the evidence; and this is for the jury, under proper instructions. If there is a conflict on a material matter of fact, and it be decided that the preponderance of the evidence does not lie with the party who alleged the affirmative, then the burden of proof has not been sustained by such party, and, in the performance of its duty, the jury must find against him."

In our opinion the testimony of the plaintiff that he had made delivery of the case of goods to the defendant was such an explanation of its loss as to relieve him from any presumption of negligence, and left the burden of proof with the defendant to prove the loss, and that it was due to plaintiff's negligence. To hold otherwise would make the measure of plaintiff's care that of an insurer. In *Sanborn v. Kimball*, 76 Atl. 890, a horse in the possession of the bailee received an injury during the night, from which he subsequently died. The cause of the injury was unascertained, and it was unknown whether it was due to accident or the design of some person unknown. The contention of the plaintiff was that the injury to the animal, while in the possession of the bailee, having been shown, it devolved upon him to satisfactorily explain the manner in which it was received, and that the absence of such an explanation fixed the bailee's liability. The court, in disposing of this contention said: "The law does not require so much, amounting in this case to an impossibility, because the cause of the injury is admitted to be a mystery. If the plaintiff's

contention were true, the liability of the bailee in cases where the causes of the injury are unknown would arise to that of an insurer." We believe this principle to be applicable under the facts of this case.

The only question urged by the defendant in support of its motion for a new trial is that the court erred in its charge to the jury by the instruction that the establishment by the defendant of the non-delivery of the case of goods by the weight and fair preponderance of the evidence, did not render the plaintiff liable, without proof of negligence. Our view is, that the plaintiff by testifying to the delivery, made the only explanation possible under the circumstances, and that under the above cited authorities the burden of proof of negligence, remained with the defendant. For these reasons the motion for a new trial must be overruled.

And now, April 11, 1921, the motion for a new trial is overruled. Judgment is directed to be entered upon the verdict in favor of the plaintiff and against the defendant upon payment of the jury fee.

Dodson Coal Co. vs. Delano

Practice - Statement of Claim - Affidavit of defense raising questions of law.

When a statement of claim alleges a breach of an express contract to which the plaintiff was not a party and the evidence in a former action showed that there was no breach the matter is res adjudicata and the affidavit of defense raising such question of law must be sustained.

Demurrer to statement. No. 327, May Term, 1919.

G. M. Roads and O. E. Farquhar, for Demurrer.

W. K. Woodbury and J. F. Whalen, contra.

BECHTEL, P. J. May 2, 1921.

This case comes to us on a demurrer filed to the plaintiff's declaration which raises three questions of law: First that the plaintiff's declaration discloses no cause of action; secondly, the bar of the Statute of Limitations; third, *res adjudicata*. The plaintiff's statement recites, *inter alia*, that prior to April 26, 1882, Warren Delano and James S. Cox were the owners of certain coal property in Schuylkill County, known as the New Boston coal lands. By indenture dated April 26, 1882, and recorded in Schuylkill County on May 1, 1882, Warren Delano and James S. Cox leased the eastern portion of said lands, consisting of 680 acres, to the Mill Creek Coal Company for the term of ten years, from July 1, 1883. Said lease contained in the 10th covenant the following provision: "Provided, that between the outer boundary lines of the demised premises and of adjacent properties there shall be left a solid wall of coal of at least sixty feet in thickness, which shall not in any manner be broken through without the written consent of the lessors." From the execution of said indenture to March 8, 1888, the said lessors maintained the said sixty foot barrier pillar, adjoining on the east the said western or Dodson tract, for the benefit of the said western or Dodson tract. By indenture, dated March 8, 1888, the said Warren Delano and James S. Cox leased to Weston Dodson and Truman M. Dodson and Charles M. Dodson the western portion of said tract of land, consisting of 690 acres, for a term of twenty-five years, from January 1, 1888. At the time of the execution of said lease the lessees therein knew and had notice of the prior lease of the eastern portion of the tract to the Mill Creek Coal Company and of the provisions therein reserving the control of the barrier pillar to the lessors, and of the continued maintenance of said barrier pillar by said lessors for the benefit of the lower or western tract.

By the execution of the said lease of March 8, 1888, under the above circumstances, the lessors therein covenanted expressly to allow and permit the lessees to enjoy

all the rights therein granted, free from any interference by reason of any act of the lessors, or those over whom they had control. By the said lease the said lessors further covenanted that during the continuance thereof they, the said lessors, would maintain and preserve, for the benefit of the said tract so leased, the said barrier pillar in the adjoining tract, which had been created for the benefit of the lessee of the western tract, and had been continuously maintained by the lessors for the benefit of the said lessee during six years preceding.

By assignment the said lease to Weston Dodson, et al., was assigned to the Dodson Coal Company, January 16, 1889, an agreement was entered into between the Dodson Coal Company, the Mill Creek Coal Company and Warren Delano and James S. Cox, fixing the boundary line between the said Mill Creek tract and the said Dodson tract. At the date of the execution of the said lease of March 8, 1888, the said Warren Delano and James S. Cox, by stock ownership, inter-family relations and otherwise, exercised a control over the policy and activities of the Mill Creek Coal Company. Subsequently to 1891, and prior to 1894, the said James S. Cox and Warren Delano directed and permitted the said Mill Creek Coal Company to remove the said sixty foot barrier pillar. As a direct result of the removal of the said sixty foot barrier pillar the boundary pillar between the two said tracts became so weakened that when subsequently the mines of the Mill Creek Coal Company became filled with water the mine inspector of the Eighteenth Anthracite District of Pennsylvania instituted proceedings which finally resulted, on July 10, 1912, in an order perpetually excluding said Dodson Coal Company from mining any of the coal within three hundred feet of the eastern boundary of the said Dodson tract, said exclusion covering not only the sixty foot barrier pillar on the eastern portion of the said tract reserved in the said lease of March 8, 1888, but also the two hundred and forty feet of coal next adjoining the said barrier pillar on the west. The

said exclusion and eviction was the direct and proximate result of said direction and permission by the said James S. Cox and Warren Delano to the Mill Creek Coal Company to remove the said sixty foot barrier pillar adjoining the said Dodson tract on the east, and when, on July 10, 1912, the said exclusion of the plaintiff became finally effective, the same constituted a breach by the said Cox and Delano of the covenants made by them in the said lease of March 8, 1888. The said breach of covenant was constituted by the continued exclusion of the plaintiff from said portion of the said tract down to the date of the bringing of the present suit.

It will be noted first of all that the plaintiffs in this case were no party to the lease made between the defendants and the Mill Creek Coal Company. It will also be noted that under the terms of that lease the defendants had a right to permit the Mill Creek Coal Company to take out the coal up to the boundary line adjoining the Dodson tract. The plaintiffs in this case admitted that they had notice of the rights of the defendants and of the Mill Creek Coal Company under this lease which had been recorded some six years prior to the execution of the lease to them. It may be well to note in this connection that subsequent to the execution of these leases the Legislature passed the Anthracite Mine Act of June 2, 1891, and that it was pursuant to the powers conferred upon him by the provisions of that act that the Mine Inspector took the action of which the plaintiff now complains.

While it is true that plaintiffs allege in their declaration that the provisions contained in the lease to the Mill Creek Coal Company relative to the maintenance of the sixty foot barrier pillar were made for the benefit of their half of the tract, it will be noted that this provision was made six years prior to the leasing of that half of the tract to the plaintiff, and while that half was still retained by the lessors of the Mill Creek Coal Company, the defendants in this suit. This statement is simply a com-

clusion of law, drawn by the plaintiff apparently for the purpose of escaping the plea of *res adjudicata*, and is not borne out by an examination of the leases attached to the plaintiff's statement and made a part thereof. If the lessors had intended to maintain the barrier pillar for the benefit of the Dodson tract, why did they reserve the right to give permission to the Mill Creek Coal Company to remove the same? In this connection it may be well to note that it was as the result of a notification of the lessors to the Dodson Coal Company to remove the sixty feet, reserved under similar provisions in their lease and an attempt on their part to comply with said notification, that the mine inspector took the action recited under the provisions of the Act of June 2, 1891. In addition to this, it is also disclosed, by the proceedings in that case, that the defendants in this case became a party to those proceedings on their own petition, and that they, not the Dodson Coal Company, appealed the case to the higher court in an effort to have the Dodsons take out the very coal which they now claim the act of the lessors prevented them from getting.

In addition to this it will be noted that under the terms of the leases sixty feet of coal was to be maintained on either side of the boundary line, and if the removal of the sixty feet by the Mill Creek Coal Company resulted in the imposing of the entire barrier pillar upon the Dodson leasehold, it seems to us that they could only complain of the additional sixty feet so imposed upon them, whereas the claim is for two hundred and forty, the amount fixed by the tribunal created by the Act of June 2, 1891. It is too plain for argument that the defendants could not foresee the passage of the Act of June 2, 1891, at the time of the execution of these leases, and if, as a result of the passage of that act and the exercise of the powers given to him thereunder, the State's official fixed this barrier pillar at three hundred feet, it seems to us that this was the action of the State and not the action of the defendants to this suit, and they could not be held responsible therefor.

We are therefore of the opinion that the plaintiff's declaration in this case discloses no cause of action.

Further than this, it will be noted that the plaintiff's declaration recites that between 1891 and 1894 the defendants directed and permitted the Mill Creek Coal Company to remove the said sixty foot barrier pillar. It also recites that the action of the mine inspector resulted finally, on July 10, 1912, in an order from which no further appeal was possible, perpetually excluding the said Dodson Coal Company from mining any of the coal within three hundred feet of the eastern boundary of said Dodson tract. An attempt is made to bring this action within the Statute of Limitations by reciting that the said breach of covenant has continued by reason of the continued exclusion of the plaintiff from said portion of said tract. We do not think that this position is tenable. If the Dodson Coal Company was forced to leave this barrier pillar by the result of the action of the defendants in directing the Mill Creek Coal Company to remove the sixty foot barrier pillar on their lease, that action, according to the plaintiff's declaration, was taken prior to 1894. If they were injured as a result of the action of the mine inspector, that action had been complete, according to their own declaration, on July 10, 1912. The suit before us was brought to No. 327, May Term, 1919. It must therefore naturally follow that unless said action was a continuing trespass, or a continuing breach of the covenants of the lease, that the rights of the plaintiff were barred by the Statute of Limitations. The action could not be a continuing one, we think, because it had been completed at the different dates mentioned by the plaintiff, and if they were wronged, their right of action accrued at the time of the injury sustained, and since they failed to assert that right within the statutory period, we think that is too plain for argument that they are barred by the Statute of Limitations.

The plaintiff endeavored, by suit brought to No. 320, January Term, 1916, against the same defendants, to col-

lect \$200,000 from them for this same breach of the covenants of these leases. In that case their offers of testimony were rejected and a verdict directed for the defendants, from which the plaintiff appealed, which resulted in an affirmance of the decision of the court below. A careful examination of the opinion therein filed leads us irresistibly to the conclusion that the same questions were raised at that time as are being raised now, with one exception, that the plaintiff alleges its conclusion, that the provision relative to the barrier pillar in the Mill Creek lease was placed therein for the benefit of its land. As we have already pointed out, this is but its conclusion and is not supported by any language in either of the leases, or by any of the facts alleged in the plaintiff's declaration.

In deciding that case the Supreme Court, speaking through its Chief Justice, said, *inter alia*, in quoting the statement filed therein, "By reason of the breach of covenant on the part of the defendants, the Mill Creek Coal Company was permitted to mine to the land line of its lease, thereby throwing the burden of the whole pillar upon the plaintiff, and requiring the whole of said pillar to be left in the property leased to it, thereby reducing the area of available coal and preventing the plaintiff from mining and taking away the coal in the various veins in this property, by which it has been damaged to the extent of Two Hundred Thousand Dollars (\$200,000), for the recovery of which this suit is brought. With the plaintiff's cause of action thus distinctly set forth as being for an alleged breach of a covenant in a lease to which he was not a party, the learned trial judge held that the overruled offers, if allowed, would not avail in this action, and the verdict was accordingly directed for the defendants.

Notwithstanding the pleadings and the offers made by the plaintiff on the trial below, its learned counsel contend on this appeal that its claim is on a broken implied covenant in the lease of March 2, 1888, to the Dodsons for quiet enjoyment, the alleged breach consisting of the de-

defendants' permission to the Mill Creek Coal Company to mine the coal pillar up to the dividing line between the two leaseholds, thereby depriving appellant of the right to mine a part of the coal to which it was entitled under the lease now held by it, executed by the defendants' predecessors. No such claim appears in plaintiff's statement. If it had a cause of action against the defendants for the breach of an implied covenant for quiet enjoyment, it was bound to have so averred in the statement of its claim, for simple as pleading has become, a defendant still has a right to know what he is called upon to answer: *Wilkinson Manufacturing Company v. Welde*, 196 Pa., 508. Plaintiff's statement avers its cause of action to be the breach of an express covenant in the lease from Delano and Cox to the Mill Creek Coal Company, to which it was no party, and this, without more, was conclusive that, for such alleged breach, it had no cause of action against the defendants, whose demurrer to its statement ought to have been sustained. But, as a matter of fact, there was no breach by the defendants of the covenant as to the pillar of coal in the lease to the Mill Creek Coal Company. The covenant in that lease provided that the wall of coal sixty feet in thickness should "not in any manner be broken through without the written consent of the lessors." With the consent of the lessors it might be broken through; and such consent was given. The lease to the Mill Creek Coal Company was executed and placed on record nearly six years before the Dodsons acquired their lease under which the appellant now holds. They and it were thus notified that the Mill Creek Coal Company could do, under the lease, what it did in mining and removing the coal pillar. Neither the pleadings nor the overruled offers of evidence established any cause of action against the defendants, and the judgment is, therefore affirmed." It will thus be noted that the Supreme Court says that there was no breach by the defendants of the covenant as to the pillar of coal in the lease to the Mill Creek Coal Company. If there was no such

breach, how can there be a recovery? The plaintiff's case is founded upon a breach of covenant, and they must show such a breach before they are entitled to recover from the defendants. A careful examination of the record and opinion in the case just cited leads us to the conclusion that the case now before us is controlled by the doctrine of *res adjudicata*.

And Now, May 2, 1921, the demurrer filed in this case is herewith sustained.

Wagner vs. Zettlemoyer

Real estate - Statute of Frauds - Specific performance.

1. A written contract with an agent to secure a purchaser for real estate, does not empower him to execute a contract for its sale, unless thereunto specially authorized by writing.

2. Where there is no evidence that a wife refuses to join in a deed, because of fraud or collusion with her husband, there can be no decree for specific performance against her; nor against the husband alone, unless it be proved that the plaintiff offered to take a deed signed by th husband alone, and to pay the full amount of the purchase money.

Bill in equity. No. 4, November Term, 1920.

W. G. Wells, for plaintiff.

A. D. Knittle, for defendant.

BERGER, J. March 7, 1921.

This is a bill in equity for the specific performance of a contract to convey real estate. It was heard on bill, answer and replication. From the pleadings and the evidence I find the following

FACTS

1. Edward F. Zettlemoyer, by deed dated July 10, 1920, recorded in the office for the recording of deeds in the County of Schuylkill, became the owner of all that certain lot or piece of ground situate on Sanderson Street

in the said City of Pottsville, being part of Lot No. 11 in plan of Norwegian Addition to the said City (Formerly Borough) of Pottsville, bounded and described as follows: Commencing at a point on Sanderson Street Nineteen (19) feet west from a corner of said lot No. 11 and lot No. 10 on said plan and at the southwest corner of a lot of Amanda Wagner, aforesaid, thence along said Sanderson Street, in a westerly direction Nineteen (19) feet, thence in a northerly direction on a line parallel with the dividing line between said lots Nos. 10 and 11, one hundred and twenty-five (125) feet, thence in an easterly direction and parallel with Sanderson Street nineteen (19) feet to corner of lot of said Amanda Wagner, thence in a southerly direction along said Amanda Wagner's lot one hundred and twenty-five (125) feet to the place of beginning, with the appurtenances consisting of a two and a half story frame dwelling house.

2. On September 10, 1920, the said Edward F. Zettlemoyer and his wife, Elizabeth Zettlemoyer signed an agreement as follows:- Agreement. Sept. 10th, 1920. Edward F. Zettlemoyer appoint George C. Ginther agent for the purpose of selling the following property: Known as No. 502 Sanderson St., Pottsville, Pa. 8 Room Frame Building, all convenience: Pipeless Furnace 20 By 150, more or less, Ground Cellar Good Chicken House, for the sum Thirty-Three Hundred Dollars, the said George C. Ginther to receive as compensation \$100.00 of the purchase price or money of said property; said compensation to be received out of the first money paid.

And I do further agree that in case of any sale of said premises during the time the said George C. Ginther is acting as my agent as aforesaid, or within 30 days after the discharge of said Agent, the said George C. Ginther shall be entitled to said \$100.00 of the purchase price thereof.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 10th day of September, A. D. 1920.

Signed, sealed and delivered in the presence of:-

Edw. F. Zettlemoyer,
Mrs. Edw. Zettlemoyer.

3. Acting in pursuance of the said agreement George C. Ginther secured Charles H. Wagner as a purchaser of the property above described for the price or sum of thirty-three hundred dollars, of which one hundred dollars was paid to the said Ginther as down money.

4. A memorandum in writing of this transaction was given to Charles H. Wagner in form as follows:-

GEO. C. GINTHER
REAL ESTATE & INSURANCE
ROOM 12, WHALEN BUILDING

POTTSVILLE, PA., Sep. 18th, 1920.

Mr. Charles H. Wagner bought the following. Description of Property from Edward F. Zettlemoyer & Wife Pr George C. Ginther Agt. Known as No. 502 Sanderson St., Pottsville, Pa. for the sum

	\$3300
Sep. 18th, 1920, Paid on Account	\$100

Bal. to be paid	\$3200
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When Deed is Transferred

Not More than Thirty Days from above Date

Recd. Payment \$100

Mr. Edward F. Zettlemoyer,, Pr.
George C. Ginther, Agt.

5. On September 20, 1920, the said George C. Ginther remitted the one hundred dollars down money to Edward F. Zettlemoyer by check, which was cashed by him and which, with its endorsements, is as follows:- Pottsville, Pa., Sep. 20th, 1920. Union Safe Deposit Bank. Pay to the order of Edw. F. Zettlemoyer, \$100.00, Payment on Property 502 Sanderson St. (Signed) Geo. C. Ginther. The check is endorsed by Edward F. Zettlemoyer, and also by J. W. Channell.

6. On September 21, 1920, George C. Ginther, the agent for the sale of the said property, George H. Wagner, the purchaser, and Edward F. Zettlemoyer, the owner, met

in the office of William G. Wells, Esq., who was the counsel for the purchaser, for the purpose of fixing a time for the payment of the balance of the purchase money and the execution and delivery of the deed.

7. The receipt given by George C. Ginther to Charles H. Wagner, the purchaser, was never shown to the owner, Edward F. Zettlemoyer. At the conference at the office of William G. Wells, Esq., October 1, 1920, was filed by the parties for the delivery of the deed and the payment of the balance of the purchase money. Mr. Wells was to examine the title to the property for the purchaser and to prepare the deed for execution by the owner.

8. On October 1, 1920, the purchaser informed Mr. Ginther that he would be unable to pay the balance of the purchase money on that day, but that he would be ready to pay it at 9 A. M. October 2nd. The owner was not notified of this change in the date for the completion of the transaction. He and his wife did not appear at the office of Mr. Wells at any time on October 1, 1920, for the purpose of executing the deed and receiving the balance of the purchase money, but were ready to do so had they been notified.

9. On the morning of October 2, 1920, Mr. Ginther met Mr. Zettlemoyer and requested him to go with him to Mr. Wells' office to conclude the transaction. He at first refused to go on the ground that it was too late, but after some persuasion went with Mr. Ginther to Mr. Wells' office, where he was informed by Mr. Wells that he was prepared, on behalf of his client, to pay the balance of the purchase money upon the execution and delivery of the deed for the property, which had been prepared by him. Mr. Zettlemoyer refused to execute the deed or to complete the transaction, on the ground that it was too late, and demanded the return of the deed to his property.

DISCUSSION

The contract in writing, made by Edward F. Zettlemoyer and Elizabeth Zettlemoyer, his wife, with George C. Ginther, merely constituted him their agent to secure

a purchaser for the property known as No. 502 Sanderson Street, Pottsville, and did not authorize him to enter into a written contract with the purchaser for the sale of the property. It is well established that the Statute of Frauds requires contracts for the sale of real estate to be put in writing by the owners of the property "or their agents thereunto authorized by writing." *Twitchell v. City of Philadelphia*, 33 Pa. 212, 220; *Everhart v. Dolph*, 133 Pa. 628, 640.

The acceptance by the agent of one hundred dollars hand money from the purchaser and the payment of that money to the owner by the agent's check, did not constitute a ratification by the owner of the contract between the agent and the purchaser. The owner when he accepted the check had no knowledge of the contract executed by the agent, and can therefore not be held to have ratified it. The use of Ginther's check by the owner of the property did not bring home to him the nature of the unauthorized contract entered into by his agent, whether oral or written, nor apprise him of its terms.

If we grant, for the sake of argument merely, that the acceptance by Edward F. Zettlemoyer of the one hundred dollars hand money was a ratification of the contract to convey the property at 502 Sanderson Street, evidenced by the receipt given September 18, 1920, by Ginther to the purchasers, the purchasers would, nevertheless, not be entitled to a decree. Had the authority of Ginther, the agent, to make a contract been in writing, to make a valid contract, it would have been necessary for him to sign the name of his principals: *Dodds v. Dodds*, 9 Pa. 315, 316. The receipt is signed "Mr. Edward F. Zettlemoyer, pr. George C. Ginther, Agt." The name of the wife of the owner is not signed to the receipt. There was therefore no contract in existence for her to ratify. Moreover, there is not a scintilla of competent evidence that she ever had any knowledge of any of the transactions between Ginther, the agent, and the purchasers. How then can she be said to

have ratified the contract made by Ginther?

She has refused to join in the deed, and it has not been shown that the plaintiff has offered to take a deed for the property signed by the husband alone, and to pay the purchase money upon the delivery thereof. There is no evidence that the refusal of the wife to join in the deed is due to any fraud or collusion with her husband. Hence there can be no decree for specific performance: *Huffman v. Bradshaw*, 17 Pa. Superior Ct. 205; *Stephens, Appellant, v. Barnes*, 30 Pa. Superior Ct. 127.

CONCLUSIONS OF LAW

1. George C. Ginther, the agent of the defendants for the sale of Edward F. Zettlemoyer's property, one of the defendants, did not have authority to make a contract in writing for the sale of said property.

2. The contract in writing made by George C. Ginther, as agent for Edward F. Zettlemoyer for the sale of the property, was not ratified in writing by Edward F. Zettlemoyer, or otherwise, so as to take it out of the operation of the Statute of Frauds.

3. There is no contract binding either of the defendants to convey the property in dispute to the plaintiffs.

4. The plaintiffs are not entitled to a decree for specific performance.

5. The bill in equity should be dismissed.

And now, March 7, 1921, in accordance with the above stated findings, the prothonotary will enter a decree nisi and give notice of said entry to the parties, or their counsel, in accordance with the equity rules.

Borskis vs. Lehigh Valley Coal Co.

Compensation - Appeal - Question of law - Permanent injury.

1. Section 306 of the Workmen's Compensation Act provides a schedule of compensation for (a) injuries resulting in total disability; (b) for injuries resulting in partial disability; and (c) for permanent injuries due to a loss of one or more specified members of the body.

2. An agreement for compensation made to compensate a disability resulting from a fracture of the leg, "to continue within the limitations of the Workmen's Compensation Act," will not be terminated at the end of 150 weeks, on the ground that the compensable injury is, as a matter of law, a permanent one resulting from the loss of a foot.

Appeal from Compensation Board. No. 291, January Term, 1921.

Roger J. Dever for plaintiff.

D. W. Kaercher, for defendant.

BERGER, J. February 21, 1921.

This is an appeal on a question of law by the Lehigh Valley Coal Company, the defendant, from an order of the Compensation Board sustaining the decision of the Referee in dismissing its petition to terminate a compensation agreement made by it with William Borskis, the claimant, and directing the resumption of payments under said agreement.

The agreement for compensation was entered into between the claimant and the defendant at the State Hospital, Fountain Springs, Pa., on June 8th, and filed with the Workmen's Compensation Board on June 26, 1917. It sets forth that the claimant while in the employ of the defendant sustained a fracture of his right leg and that the disability began on April 11, 1917. The compensation agreed upon was 50 per cent of the claimant's weekly wage, or \$8.03 per week, without the duration of this payment having been definitely fixed, but it was "to continue within the limitations of the Workmen's Compensation Act of 1915, until terminated by final receipt, supplemental agreement, or

order of the Workmen's Compensation Board."

After having paid to the claimant compensation at the fixed rate, for one hundred and forty-eight weeks, the defendant tendered him compensation for two additional weeks, but the claimant refused to accept it or to sign a final receipt terminating the agreement, whereupon the defendant filed its petition under Section 426 of the Compensation Act to terminate the agreement. It alleged that the claimant had been paid full compensation for one hundred and forty-eight weeks, and tendered full compensation for two additional weeks, as though the injury for which he was being compensated had been "for the loss of the use of a foot" for a period of one hundred and fifty weeks, that constituting "the entire extent of his (claimant's) disability," but that he had refused to accept the compensation admitted to be due or to sign a final receipt. In answer the claimant alleged that he was confined to the State Hospital at Ashland, Pa., and was still suffering from a compound fracture of the right tibia, and unable to work. No testimony has been filed with the record, and neither party has complained of a diminution of the record, nor is any question raised respecting the sufficiency of the evidence, as a matter of law, to support the findings of fact made by the Referee.

Seven exceptions are filed in support of the appeal. Each exception challenges the correctness of a legal conclusion drawn from the Referee's findings of fact. These findings establish that the compensable injury is a compound fracture of the right leg below the knee, and that a sinus in the injured part, due to an injury to the bone, existed on the day of the hearing to terminate the compensation agreement. On that day the claimant had not yet lost the use of his foot, which was uninjured, and the leg, as nearly as could be foretold, would mend. The claimant could then do light work if it permitted him to keep his foot at rest, but there is no finding that he had such employment. The third finding of fact by the Referee that "the defendant

Company petitioned your honorable Board to terminate the compensation agreement existing between the parties upon it paying to the claimant compensation for two more weeks. It avers that it then will have paid to the claimant compensation for the loss of a foot or one hundred and fifty weeks," is a succinct statement of the ground upon which the defendant seeks the termination of its agreement, and is the only question which has been argued or pressed before us.

The contention of the defendant is that the injury compensated under the compensation agreement is that which is defined in Section 306, paragraph (c) of the Workmen's Compensation Act of 1915, which provides that "For all disability resulting from permanent injuries of the following classes, the compensation shall be exclusively as follows: ***** For the loss of a foot, fifty per centum of wages during one hundred and fifty weeks. ***** Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and ankle shall be considered as the equivalent of the loss of a foot. *****"

The contention of the claimant is that he is to be compensated under Section 306, paragraph (a) of the Workmen's Compensation Act of 1915, which establishes a schedule of compensation "for injuries resulting in total disability" during a period not exceeding five hundred weeks. The defendant takes the position that the words in paragraph 3 of the said section, "disability resulting from permanent injuries" are the exact equivalent of the introductory words of the said section providing a schedule of compensation for injuries "resulting in total disability." We agree with the contention of the defendant that amputation between the knee and the ankle would be compensated as a "disability resulting from permanent injuries," as for the loss of a foot for a period not exceeding one hundred and fifty weeks, but we cannot agree with his contention that the phrase "disability resulting from permanent injuries" has the same meaning as the phrase "injuries resulting in total disability."

ity." A permanent injury may or may not cause total disability. The loss of a foot, while a permanent injury, would not necessarily, or of itself, cause total disability, whereas a man injured might be so disabled by his injury, notwithstanding that he had lost no member of his body, as to be totally disabled. We are of the opinion that Section 306 of the Workmen's Compensation Act provides a schedule of compensation for three classes of injuries, namely, for injuries resulting in total disability; for injuries resulting in partial disability; and for permanent injuries due to loss of one or more specified members of the body. In injuries of the last named class the compensation in respect to time is fixed at a definite period, irrespective of whether the disability, either total or partial, exists during the entire time fixed by the statute. In injuries of the other two classes compensation is not fixed at a definite period, but for an indefinite period, with the limitation, however, that the period shall not exceed five hundred weeks. The claimant's injury is shown by the findings of the Referee to be an injury belonging to the class of injuries resulting in total disability. It has not been found as a fact that this total disability has ended, and that a period of partial disability, reducing the compensation of the claimant to a lower rate, has been entered upon.

Short of payment for a full period of five hundred weeks, the defendant may be relieved from its agreement by showing that the total disability has ceased before the expiration of that period, or it may have its agreement modified within that period by establishing, according to the provisions of paragraph (b) of Section 306, *supra*, what rate of compensation during the partial disability should be. For the reasons stated the appeal must be dismissed.

And now, February 21, 1921, appeal dismissed. The defendant is directed to pay the accrued payments due the complainant on its compensation agreement, and to make the further payments as provided in said agreement, until it is modified or terminated according to law.

Fritz vs. Fritz

Divorce - Decree pro confesso - Court Rule 17 - Answer nunc pro tunc.

A decree pro confesso cannot be made upon a libel in divorce. Rule 17 requires the master in divorce to examine the witnesses upon all matters which appear relevant and material.

The court, in the exercise of its discretionary power may permit the respondent to file an answer nunc pro tunc, before the report of the master is filed.

Rule to file answer. No. 11, January Term, 1921.

M. H. Spicker, for rule.

R. R. Koch, contra.

BERGER, J. April 18, 1921.

On November 8, 1920, a subpoena in divorce, returnable January 3, 1921, was awarded by the court against Joseph Fritz, the respondent. A rule on him to appear and answer within thirty days after the return day of the subpoena and a copy of the libel were served with the subpoena, as is required by paragraphs 2 and 3 of Rule 17 of our Rules of Court regulating practice in proceedings in divorce. No appearance was entered for the respondent until February 8, 1921, and no answer was filed on his behalf. On February 28, 1921, Vincent J. Dalton, Esq., was appointed master to take the testimony and report his findings to the court. When the case came on for hearing before him, the respondent appeared in person and by counsel. His right to cross-examine the libellant's witnesses was challenged on the ground that he had forfeited that right by his failure to answer, but the master permitted the cross-examination subject to the objection of the libellant. Under like objection the respondent was permitted to offer evidence in his defense. After the case had been closed and before the report of the master was filed the respondent petitioned the court for leave to file an answer nunc pro tunc, whereupon a rule to show cause issued, to which the libellant has made

answer. The question for determination is the right of the court, in the exercise of its discretionary power, to permit the answer to be filed.

The ground of divorce alleged in paragraph 12 of the libel is: "The said Joseph Fritz, respondent, by cruel and barbarous treatment, has endangered the life of your petitioner, the libellant, and has offered such indignities to her person as to render her condition intolerable and her life burdensome, thereby forcing her to withdraw from his house and family. The cruel and barbarous treatment and indignities complained of have consisted of assault and batteries by respondent upon the person of libellant, culminating in a beating on the night of Friday, September 24, 1920, whereupon said libellant was forced to leave respondent and take other quarters in the house, which is owned by libellant. That for a period of some years the respondent has by drunkenness, the use of abusive, offensive and insulting language, and by physical violence been guilty of the conduct above complained of." The respondent in the answer which he seeks to file with the court's leave, in defense of the above recited charge, says, *inter alia*, as follows: "12. It is denied as averred in paragraph 12 that the said Joseph Fritz, respondent, by cruel and barbarous treatment, has endangered the life of your petitioner, the libellant, and has offered such indignities to her person as to render her condition intolerable and her life burdensome, thereby forcing her to withdraw from his house and family. It is further denied that the respondent has committed numerous assaults and batteries upon the person of the libellant, culminating in a beating on the night of Friday, September 24, 1920, requiring the libellant to leave respondent and to take other quarters in the house in which they resided. It is not true that for a period of years the respondent has by drunkenness, the use of abusive, offensive and insulting language and by physical violence been guilty of indignities to the person of his wife. *****" This, it seems to us, is such a denial of the grounds upon which a divorce is

sought as to define the issue to which the testimony taken before the master was directed. The respondent does not seek to raise an issue for determination by a jury, nor does he ask to have the case before the master reopened. He merely seeks to file an answer so that the pleadings may show the issue to which the testimony taken before the master was directed.

A decree pro confesso cannot be made upon a libel in divorce: *Kilborn v. Field*, 78 Pa. 194; *Smith v. Smith*, 15 Pa. Superior Ct. 366, 371. To sustain the contention that a respondent, who desires to offer testimony or to cross-examine the libellant's witnesses, should file an answer whether the issue be tried by the court or a jury, the libellant relies upon the dictum of the court below in *Oxley v. Oxley*, 191 Pa. 474. Notwithstanding the respondent in the case just cited had not filed an answer, he had appeared and cross-examined the libellant's witnesses and testified in his own behalf. In affirming the judgment of the court below granting the decree, based upon its findings of fact, it does not appear that either the court below or the appellate court disregarded the respondent's testimony because of the irregularity arising out of his failure to file an answer.

Aside from the general policy of the law not to permit divorces to be granted upon mere default of one of the parties without a full hearing and proof to sustain it, paragraph 15 of Rule 17, *supra*, provides: "15. When the master proceeds to take the testimony upon the merits he shall examine each witness specially and in detail upon all the matters set forth in the libel and the answers and upon such other matters set forth in the libel and the answers and upon such matters as may appear to be relevant and material. It shall be his duty, whether requested by either party or not, to summon and examine such witnesses as he may have reason to believe have knowledge of any matters relevant and material to the just and proper determination of the cause." And paragraph 7 of the same rule of court permits the respondent, with leave of court, upon cause

shown for the delay, to demur or answer to a libel. The only purpose the libellant can have in opposing the filing of an answer nunc pro tunc, all the evidence of the respondent having already been introduced under objection, is to limit the master in the consideration of the evidence to that introduced by the examination in chief of witnesses. The practical effect of such a course of procedure would be to grant the decree pro confesso, because the libellant, after having verified her libel under oath, has presumably supported it by her testimony before the master, and a divorce in this case might be sustained on the uncorroborated testimony of the libellant: *Krug v. Krug*, 22 Pa. Superior Ct. 572, 574.

Our right to allow an answer to a subpoena in divorce to be filed nunc pro tunc is clear, and this seems to be the case in the absence of a rule of court, even though the ground for the application to file such an answer does not appear: *Daugherty v. Daugherty*, 28 Pa. Superior Ct. 327. The reason for the allowance stated in the petition is "inadvertence and oversight" and this was stated at the argument to have been the inadvertence and oversight of respondent's counsel, due largely, if not entirely, to the failure of the respondent to employ counsel until more than thirty days after the return of the subpoena. Throughout this proceeding, and at this moment, the parties to this action are living in the same house. In *Fuel City Mfg. Co. v. Waynesburg Products Corporation*, Appellant, 268 Pa. 441, it was held that relief would be granted from a judgment entered by default, as a result of the mistake or oversight of counsel, where application is promptly made and a reasonable explanation or excuse for the default is shown, and a defense upon its merits exists. A proper construction of our Rules of Court above referred to leads to the conclusion that it is their purpose to permit a defense on the merits to be interposed in every action of divorce, whenever possible. For the reasons stated we are of the opinion that the respondent's rule should be made absolute.

And now, April 18, 1921, the rule to show cause why the respondent should not be permitted to file an answer nunc pro tunc is hereby made absolute and the answer submitted to the court is directed to be filed.

Greiner vs. Crone

Negligence - Automobile injury - Burden of proof - Assignment of error.

The burden is upon the plaintiff to prove defendant's negligence and upon the defendant to prove contributory negligence.

Where no error is assigned to the admission or rejection of testimony or to the charge of the court the court will overrule a motion for a new trial.

Motion for new trial. No. 42 March Term, 1920.

Henry Houck, for motion.

A. D. Knittle, contra.

BERGER, J. April 25, 1921.

Harvey J. Greiner, the plaintiff, was injured by the defendant's automobile about 6:20 P. M., July 1., 1919, as he was walking north on the west side of Centre Street in the City of Pottsville, at or near the intersection of Centre and Norwegian Streets. Centre Street, which runs north and south, and Norwegian Street, east and west, intersect at right angles. At the point of intersection Centre Street, from curb to curb, is 47 feet 11 inches in width, and Norwegian Street is 13 feet 3 5-8 inches in width. The pavement on Centre Street is 15 feet 7 1-2 inches in width, and that on Norwegian Street 4 feet 7 7-8 inches. The negligence charged against the defendant is that he drove his automobile in a careless, reckless and illegal manner upon the pavement and struck the defendant, causing the injuries

for which this action is brought.

The plaintiff testified that after he had crossed Norwegian Street, and when he was walking on the pavement at the northwest corner of Centre and Norwegian Streets, he was hit, without warning, by the defendant's automobile and driven against Mortimer's store, located on that corner, with such force that both plate glass windows were broken. He dropped, when he was released by a backward movement of the car, and was struck again, in the act of arising, by a forward movement of it. He was taken to the hospital and as a result of the injuries received was wholly disabled for a period of eleven weeks, during which he lost his wages of twenty-six dollars per week and expended the sum of \$17.65 for medical attendance and drugs. Two witnesses who stood on the southwest corner of Centre and Norwegian Streets at the time of the occurrence; two who stood on the northeast corner of said streets; and two who were in the automobile driven by the defendant, corroborated the plaintiff respecting the place where, and the manner in which he was struck. The testimony of some of these witnesses would support the inference that the defendant ran his automobile on to the pavement to avoid an approaching team. At the close of the plaintiff's case the defendant moved for a compulsory nonsuit, which was refused.

The defense was that the plaintiff was struck, not on the pavement, but on the crossing on Norwegian Street, due to his own negligence. In support of this defense the defendant testified (and he was the only eye witness for the defense) that the plaintiff stopped suddenly in the middle of Norwegian Street foot crossing with his back toward his car, and that when plaintiff realized his dangerous position, as the defendant swerved his automobile toward Centre Street to avoid striking him, he seized the automobile and was pushed by it over the pavement and against the corner of the Mortimer store. He also testified that he had blown his horn on Centre Street, on the east side of the trolley tracks which occupy the center of said street, immediately

before making the turn to enter Norwegian Street, and that he was going at approximately eight miles an hour. He attributed the position of the defendant on the Norwegian Street crossway and his failure to get out of the way of the automobile to drunkenness. In rebuttal the plaintiff denied that he was under the influence of liquor, and several of the eye witnesses to the accident were recalled, who testified that he appeared to be sober.

The jury was instructed that the burden was upon the plaintiff to prove the defendant's negligence by the weight and fair preponderance of the evidence in order to sustain a recovery. The duty of the plaintiff and of the defendant in the use of Norwegian Street was defined to it in a manner of which the defendant has not complained; and it was further instructed that if the weight and fair preponderance of the evidence established that the plaintiff was injured while on the pavement, the burden was upon the defendant to show that it was not practicable, in the exercise of ordinary care, under the circumstances, to have prevented any part of his "automobile from running upon the sidewalk" in accordance with the principles stated in *McGettigan v. Quaker City Automobile Co.*, Appellant, 48 Pa. Superior Ct., 602, 605. On the question of contributory negligence the jury was instructed that the burden was upon the defendant to establish it, which, in the absence of any evidence in the presentation of the plaintiff's case to support an inference of contributory negligence on his part, was correct. *McManamon, Appellant, v. Hanover Township*, 232 Pa. 439, 445. The only exception taken to the charge by the defendant was to the answers given to the points presented by him, and no order to write out the charge was requested, from which it may be inferred that the only objection to the charge consisted in the answers to the points. See *Allcgro v. Rural Valley Mut. Fire Ins. Co.*, Appellant, 268 Pa. 333, 337. A verdict against the defendant having been rendered, he filed a motion for judgment n. o. v. and for a new trial which will be considered briefly in the order stated.

The motion for judgment n. o. v. is founded on the refusal of the defendant's twelfth point, which was a request for the direction of a verdict in the defendant's favor. In the consideration of this motion "the testimony should not only be read in the light most advantageous to plaintiff, all conflicts therein being resolved in his favor, but he must be given the benefit of every fact and inference of fact, pertaining to the issues involved, which may reasonably be deduced from the evidence:" *Mountain, Appellant v. American Window Glass Co.*, 263 Pa. 181, 183; *Bowser, Appellant, v. Citizens Light, Heat & Power Co.*, 267 Pa. 483, 487. Thus viewed, the testimony in this case is amply sufficient to sustain the verdict.

The reasons assigned for a new trial are: "1. The verdict was against the law. 2. The verdict was against the evidence. 3. The verdict was against the weight of the evidence. 4. The verdict was against the charge of the Court. 5. The defendant reserves the right to file additional reasons after the testimony and the charge of the Court are transcribed." No additional reasons have been filed. For the reasons stated in *International Forge Co. v. Paul S. Reeves & Co., Inc.*, Appellant, 264 Pa. 431, 432, the motion for a new trial must be overruled.

And now, April 25, 1921, the motions for judgment n. o. v. and for a new trial are hereby overruled, and judgment is directed to be entered upon the verdict in favor of the plaintiff and against the defendant upon payment of the jury fee.

Rice vs. Schuylkill Railway Co.

Negligence - Finding of the jury - Motion for judgment, n. o. v.

If an emergency presents itself so unexpectedly and so quickly that it confuses one who must act and deprives him of ability to exercise his best judgment the jury is warranted in finding the defendant not guilty of negligence and such finding will not be set aside by the court upon a motion for judgment non obstante veredicto.

Motion for judgment. No. 45, September Term, 1920.

A. L. Shay for motion.

M. A. Kilker, contra.

KOCH, J. July 25, 1921.

Between twelve and one o'clock, in the day time, on the 17th. day of March, 1920, plaintiff, while operating his Oakland automobile on Main Street, in the Borough of Girardville, collided with the defendant's work-car, where Richard Street enters main Street. Main Street extends east and west and Richard Street north and south. A single track street railway lies in the center of Main Street which is fifty feet wide between curbs, and is practically level where the accident occurred. A branch of the street railway leading to Shenandoah starts from the Main street track at Richard Street and is constructed about the middle of said Richard Street which is thirty-five feet between curbs. Richard Street is on the north side of Main Street, and the curve on the Shenandoah branch which connects with the Main Street track turns to the west from Richard street on to Main Street and is there connected by a switch with the main track. The track on Richard Street had not been operated all that winter and what is called a "station car" in this case was standing on Richard Street about even with the building line on Main Street. When about to leave the borough of Girardville to go to his home in Locustdale, the plaintiff drove on Second Street to Main Street and then

turned west on Main Street on which his view was clear and unobstructed all the way to Richard Street, which is three squares west of Second Street. The squares are each about four or five hundred feet long. The plaintiff had five guests in his automobile, making six persons in all. He drove west on the right side of Main Street and when he got to Ginley's furniture store, where he intended to stop, he slowed down his car but changed his mind and proceeded slowly on his way, going at the rate of six or seven miles an hour for a distance of about two hundred feet when he collided with the work-car. The motorman was the only person on the work-car. When first seen by Rice it was standing on the main track but he and his witnesses claim that when the automobile got to within from six to twelve feet of the curve on the Shenandoah branch the work-car was suddenly backed off of the Main Street track on to the curve of the said branch and ran across the path of the automobile so that Rice could not pass between the work-car and the station car, and that in the suddenness of the emergency he quickly steered to the left and struck the side of the work-car. At least one of Rice's witnesses claim that there was insufficient space for an automobile to turn on to Richard Street between the curb and the station car. When the auto hit the work-car both stopped. When the two collided four occupants of the automobile were thrown out of it. The radiator, the right fender, the right head light, the hood, the stem valves of the engines and the cam shaft were either broken or damaged, and the automobile was rendered inoperative. Rice swore that, going six or seven miles an hour, he could stop his automobile in five feet. It was the first car he ever operated and he had run it 2139 miles. It seems that at the time of the accident his car was in second gear.

To show his version of how the accident happened, we will quote from his testimony, as follows:

“**** I saw that car start to come over this way across my road and, - Q. You saw what car coming this way?

A. The work-car. Q. The work-car? A. Yes. Then I saw another car standing on Richard Street; that is the station car and then I make my mind quick if I turn to the right I hit that station car and if I pass there may be I catch between them this way. **** and I went right up to the left and turn as much as I can the steering wheel and turned it and tried to avoid an accident. Then I ran into the side of the car. Q. Ran right into the side of the trolley car? A. Yes. Asked how his automobile struck the trolley car, he replied, "It struck right sideways; the right frame of the car, the frame and fender hit sideways. This way, the car." Again: "Then I wanted to go to the furniture store but I change my mind, and then I go again, put it in low, then I put it in second, and when I put it in second I see that car is right shoot across my road. Then I saw another car standing on Richard Street. Then if I turn to the right I have no chance to escape it, and if I pull through maybe I get smashed with this car coming towards Richard Street. Then I shoot the car right up to the left, turn it right up to the left. I judge I do the best." "It (the work-car) was moving across my road."

"The work-car, when it got near him, then he started to move."

"Q. And you deny that you were going at about thirty miles an hour? A. No, I do not go that fast; I go between seven or six miles; that is all what I go. Q. Six or seven miles? That is awful slow, is it not? Why could you not stop that car then if you were going only six or seven miles? A. It was too late to stop. Q. Yes, but if you were going six or seven miles you could stop your car, could you not in a couple of feet, it that not so? A. When I saw the danger I judge it best." "Q. In how many feet could you stop that car if you were going six or seven miles an hour? A. My car I believe I can stop in above five feet."

"Q. How close were you to this work-car when it started moving? A. I was about five or six feet, something like that. Q. That car would move very slowly would

it not, if it started out it would move very slow, would it not, at first especially? A. You mean my car? Q. No, the other car, the work-car; when it started it would move very slowly would it not? A. It was moving, that is all; I could not tell you how quick he moved. Q. You do not seem to know much about it, do you? Where was your car when the work-car started to move, as you testified? A. When I saw that car come right across my road, because I look ahead, that car was standing on the main road. I looked ahead; I always look ahead; I never thought that car would be coming this road, because that branch road is not in operation." Then I thought that may be that car maybe it is moving on this track, and if they operated that road I was safe to go over." On cross-examination, he said; "When I got here at Ginley's store, I judge about two hundred feet, then I got on this side, then I have a notion to stop, and I was pretty near to stop; I put it into neutral, but I change my mind and I put it into low gear, and I start my car, goes this way, and there is the station car, and then I put it into second. Then I saw the car coming here, start right across my road. Then I saw this station car here. Well, if I turn right then maybe I get squeezed between them or I hit this car, **** If I pull through, I judge I get caught, I get bumped right on the side; then I turn up this way and the car was about here, and then I struck pretty near the middle of the car, sideways." "***** I just show you when I saw the way the accident, I judge I did the best, and I did the best. Q. You did what you thought was best? A. Yes. Q. You could have easily turned into Richard Street, could you not? A. I judge that I do the better to turn to the left." There is a church on that corner and it stands back from the pavement. The pavement is about eight feet wide on Main Street and is less on Richard Street. No warning was given when the car began to back, and the motorman was not visible. "When I turned the steering wheel I turned this way and I hit the trolley car; then those fellows that was sitting in the back

seat they bumped against me, they hit me toward the steering wheel," and the next morning the doctor told him a rib on his right side was broken.

William Watersheid who accompanied Rice on the trip from his home in Locustdale and sat with Rice on the front seat on the right side testified, that as they went down Main Street in Girardville, the work-car was standing on Main Street and as they approached Richard street it suddenly backed out of Main street and into or across Richard street without giving any warning at all, and without anybody being on the rear end of the car. He also said that the automobile was from six to ten feet away from the work-car when it commenced to back. Being asked, "Could you have turned down Richard Street," he replied, "It would be impossible the way I look at it, because he turned the other way, which was the most space, which he thought would be for the better." Watersheid does not think they could have gone straight ahead and cleared in front of the work-car.

"Q. Was the trolley car moving or standing when the automobile collided with it? A. When it collided I think it was pretty well stopped; it was moving when I saw it and I got up ready to jump, but in the meantime it collided and I got thrown out and the windshield cut my face and I got thrown on the curbstone and broke my rib." Later, he said that he did not know whether he struck the curb, but that it was something hard and that he was unconscious for a couple of minutes. His face was so badly cut that it required twelve stitches and one of his left ribs was broken. He testified that he did not think that the automobile was going more than fifteen miles per hour when the work-car began to back, and that he was probably going at the rate of six or seven miles per hour, and might have been going seven or eight miles per hour. When asked whether there was not plenty of room to go to the right down Richard Street, he replied, that there was a car standing in the centre of Richard Street, and in that space you

could not easily make the curve. He thinks that Rice by turning to the left, turned the proper way. "Q. Then, according to your story, you were right at the corner of Richard and Main Streets when this work-car started to move? A. Yes, we were very close to the track."

The next witness called was Walter Morris. These three people, Rice, Watersheid and Morris all sustained injuries and damages in the accident, and each, therefore, sued the electric railway company, and, by agreement of the parties, the three cases were tried together by the same jury. Morris lives in Girardville and he was invited to go along to Locustdale and back. He was sitting in the middle of the rear seat. According to his testimony, the automobile "was not running fast at all," it, "was running nice and slow." This appears in the record of his examination: "Q. What occurred when you got down near Richard Street? A. The working car was standing; when we started out I saw it and I said, 'Joe, watch out for that car,' but we did not know that the car was going to stand. Then Joe said, 'I will stop at Ginley's,' and he said, 'We will stop there and the car will go away from the road.' But as soon as we got there Joe said he changed his mind; he said, 'I will go right thru,' and as soon as we were right near, the car started to come right in front of us."

"Q. What do you mean when you say, 'When we were right near?' Where were you; how close were you to it? A. We were about twelve to fifteen feet, but the car started to run as fast as anything; nobody was on the - - - Q. Let me ask you this, when then car did come on that curve, did it cut in toward you? A. Yes, sir. ***** Q. In other words, the curve on Richard Street took the trolley car towards you, did it not? A. Yes, sir; the trolley car came right towards us like. Q. Then just tell us what happened? A. Then Joe started to turn - - - I saw that the accident is coming, the car is coming right towards us, and right near it, and I jumped and stood on my feet and at the same time got knocked. I do not know after what

happened." He knew that he fell out of the machine when the collision happened but not what happened afterwards. He testified that his scalp "was all tore off." The doctor put sixteen stitches in his scalp. He saw nobody on the work-car. No warning was given on the work-car; he saw nobody around.

"Q. How close were you in the automobile to the trolley track on Richard Street when the work-car began to move in on Richard Street? A. I guess about twelve feet or so; I could not tell you how close; it was very near. He started like a shot at first; I do not know what happened him; he started the trolley car, started like a shot, pushed back as quick as possible. Q. Could you have gone in front of it and kept on the line you were going; could you have passed it? A. Could not pass it no way; the car came in so fast in your way. Q. Came in so fast? A. Yes, and Joe turned to the left, but he could not escape the car."

Rice had gone from Locustdale to Girardville to sell a property and when the accident happened was on his way back to Locustdale to get the deed. He met Morris and asked him to go along saying, "We will have a ride down and back again." Asked as to the speed of the automobile, he guessed it was six miles or seven per hour. Being asked, "It was not more than seven was it," he replied, "I do not know; I cannot tell that, but he was not going fast, I am sure of that. Q. You could all see this car standing there, could you not? A. Sure, from the top, from the opera house you can see; the road is straight ***** "Q. Was your car right at Richard Street when this trolley car began to move? A. The car began to move - - - we were not right quite, but we were at Richard Street, a couple feet from it." "Q. You could have easily gone down Richard Street, could you not? A. Could not. That street is too narrow; he could not go that way. C. There was fourteen feet on your side of the car was there not? A. Fourteen? Q. Yes. A. There is a sharp curve there; you cannot curve it that fast. You can see it is a very sharp curve." "Q. You

can turn around the corner, can you not? A. Yes, if there was no other car there you could turn around, but this trolley car was standing in the middle. It was too sharp to turn there."

John Oshura bought Rice's property and was going back to Locustdale for the old deed. He testified, "As soon as we came to that Richard Street, then the working car backed on Richard Street." He saw no one around the car; there was no bell sounded or warning given.

"Q. How did Mr. Rice drive the automobile? A. Well, he don't have to run fast; just about middling like." This witness sat on the back seat. "Q. You said when you got to Richard Street this work-car backed in across Richard Street. How close were you to the work-car when it began to back in? A. The machine was to that working car about eight or nine or seven feet; I could not tell right. Q. But you were very close to it? Yes, we were very close to it; I tried to jump out but I cannot; no chance." Q. Then the way you were driving the automobile could you have passed in front of the trolley car, would you be able to pass in front of it? A. No, I do not think. Q. What did Mr. Rice do then? A. He tried to turn to the left side." This witness sat in the rear seat on the left side. He and Rice were not thrown from the machine but the other four passengers were. The automobile hit the work car "right side, corner like." "Q. And you say you were eight or nine feet from the work-car when it started? A. Something like that. Q. How did it start, slow? A. It goes about middling way. Q. What? A. About middling, the way the cars is run." He saw nobody on the platform of the work-car. "Q. Joe turned to the left, did he not? A. As soon as he came up to this curve like, at the switch like, and as soon as he came up close the car goes right back, the working car. So Joe had no chance to turn on the right side like."

James McIntyre, who conducts a store in Girardville, testified that he was walking west on Main Street and

had crossed Richard Street and had got pretty near the end of the first building, maybe the next building - about thirty feet - when he heard the crash of the collision. As he passed along he saw the work-car and thought it was the main track right where the switch is. When he heard the crash he looked around and "saw the men rolling out of the automobile, right against the trolley." He saw "the automobile and the car right against each other and the men rolling out, and went over right away." "Q. Where was the trolley car then that you had seen standing on the main track when you were just crossing Richard Street; where was it when you looked around, when you heard the crash? A. When I got there it was on the branch, backed on the Shenandoah track a piece. Q. It was over on Richard Street? A. Yes; it was not all the way; it was a distance, that is part way in on the track." He does not remember hearing any bell or warning, or the car moving. "Q. Where was the trolley car standing then? A. In on the branch track. Q. In on the branch track, that is, on the Richard Street? A. Yes; that is it was part way in on that track. Q. Was any portion of that car on the main track? A. I could not swear to that." But he imagines nearly all of the work-car was on the branch track after the accident. "Q. It was not down on the curb line? A. ***** it was still on the curve." He judges that it was about ten or twelve feet from the left front of the car to the curb.

William Canavan who drives a motor truck got to the scene of the accident after it happened. We quote from his examination as follows:- "Q. If you were driving down Main Street and keeping between the trolley track and the curb on the north side, could you turn down Richard Street at that sharp angle? A. You may be able to turn, but if anything turned up like turned up with them, I do not see how you could turn. On one side you could not, that is on the west side you could just about make that when everything is normal. Q. When you swing out for a big curve

down? A. Yes, sir." "Q. Coming down Main Street, as these people came, if they came six or seven miles an hour, there would be nothing to prevent them from turning into Richard Street, would there? A. Well, that all depends on how quick this thing came up. Of course if a fellow went out there with the intentions of turning down Richard Street, he could turn down. Q. Going six or seven miles an hour he could turn into Richard Street easily, could he not? A. Not if he got to the close side of the car he could not. Q. What do you mean to say by that? A. That trolley car on Richard Street was near Price's corner; there is one side closer; there is more room on one side than the other." The car stood below the intersection of Richard and Main Street. He admits that six or seven miles an hour is slow for an automobile but he quibbles about one's ability to turn that corner when going that fast.

Thomas King who conducts a store in Girardville arrived at the scene of the accident after the collision. When asked, "Q. How did you find the cars; what was their position on the highway?, replied, "To the best of my recollection there was a car coming right off Main Street on to Richard Street, and the automobile was right aside of it. Q. How far across Richard Street was the work-car? A I judge very near the whole length of itself. Q. The whole length of itself? A. Yes, very near the whole length of itself off the main track." He judges the car about eighteen to twenty feet long. He believes the curve of the track extends all the way across Richard Street. He judges the car was eight or ten feet from the northwest corner of the curb.

John Groody the last witness called for the plaintiff came on the scene after the accident. He was asked? "Q. What was the position of these cars on the highway? A. I would judge that was about three-quarters or may be the full length of itself in on the Richard Street branch; that is, the trolley car." He thinks the trolley car was eighteen to twenty feet long. The automobile was on the

side of the trolley car. He thinks the front end of the trolley car was seven or eight feet from the curb. The automobile was "sort of on the center of the road" on that side of the main track.

When the defendant came to put in its case the first witness, Charles D. Amour, the motorman on the work-car, testified that he had moved the car from the main track on to the branch shortly before the plaintiff came along in his automobile, and that the work-car was standing on the curve at the time the automobile struck it; that the closest point of his work-car was seventeen feet and four inches from the corner of the car to the curbstone by actual measurement; that he sounded the gong and was on the east end of the car. He sounded the gong when he saw Rice coming over a hundred feet away. The right hand side of the front of the automobile collided with the work-car. The work-car in his judgment was twenty-five to twenty-seven feet long. He denies that there was a car standing on Richard Street as a depot at that particular time, at least, he says he did not see it. He had stopped his car to let an automobile pass, and when he saw Rice coming along he continued to stop to let him pass. In his judgment, Rice was going at a speed of at least twenty miles an hour, and he rang the gong to attract his attention while his work-car stood there. The automobile for which he had stopped had gone in the same direction that Rice was going. Rice had seventeen feet and four inches to pass on one side and twenty feet on the other. As he came along he gave his wheel a twist to the left and ran into the work-car while it was standing.

C. S. Bailey the general manager of the defendant company arrived on the scene of the accident soon after it happened. He measured the distance from the trolley track to the curb stone and said it was seventeen feet four and one-half inches. The trolley car was standing partly on the curve and partly on the main line. It had gone through the switch but the main line was not clear. The car was

about twenty-five feet long.

Harry Kress testified that he was standing on the church corner and says that Amour stopped his car and rang his gong and left an automobile pass and looked up the street and saw "this other automobile coming down." He waited for him to come down and he was coming down fast and he turned his machine in towards the car and hit it. "He was coming over twenty miles an hour," and the trolley car was standing still. He was working for the Schuylkill Light Company at the time of the trial. The Schuylkill Light Company and the defendant have the same office. The wheels of the trolley car had passed off the main track on to the curve. "Q. Was Amour going with his work-car when the first automobile went down? A. He was moving slowly when he saw it coming; when he saw it coming he stopped and rang his gong. Q. And then he saw the other one coming down and he was stopped yet, was he not? A. Yes, sir. Q. And he rang the gong so it would not come over and strike him? A. Yes, sir, but the machine Rice was driving, the machine turned; he turned the wheel right over and hit the line car. Q. Although he had plenty of room ahead of him? A. Yes, sir, he had fifteen feet to the best of my estimation." The wheels of the car were off the main track but the back of the car was not clear.

Stephen Horan, a disinterested witness, who is lame, hustled across the street as Rice came along. He thought Rice was going "at a pretty lively rate of speed," "Say about eighteen or twenty miles an hour." Horan was about ninety feet from Richard Street. As to the trolley car, he was asked, "Q. Was it going or was it standing still," and he replied, "When they were coming down the street she was moving in on the spur. He stopped his car, and Joe Rice, the chauffeur of the car, I think he must have made the impression that the car was going to come through, and the car stopped and he turned to go to the south side of the street and he hit the front of the trolley car." When

he undertook to cross the street Rice was about two hundred feet away from him and blew his horn, but whether he blew it for him or not he does not know. He is positive that the work-car was standing still when the accident occurred, and thinks there was sufficient room for an automobile to have passed without hitting the car.

From the foregoing and the fact that the jury rendered its verdict in favor of the plaintiff, it might be said that the following is a statement of the case as the jury found it, to wit: As Rice drove along Main Street, looking ahead, he saw the defendant's work-car standing on the Main Street track just beyond the switch point on the Shenandoah branch with its back end toward him and with no one visible on the car, and Rice was operating his motor car at such a rate of speed that he could have stopped it possibly within five feet or a little more, but that when he got to a point from six to fifteen feet from the Shenandoah branch track, the work-car without any warning of any kind so suddenly and rapidly moved off the main track and on to the branch track as to get into his road so suddenly as to confuse him and deprive him of the correct exercise of his best judgment, which judgment would have been to stop his car immediately. And further that he did what appeared to him at the time as the best thing to do when he quickly turned his car to the left. The jury may also have found from the testimony that Rice had three safe ways to escape the accident: (a) by stopping his car immediately; (b) by going straight or nearly straight ahead in front of the work-car and across the branch track; (c) by turning to the right and going on to Richard Street between the station car and the curbstone on the eastern side of Richard Street; but that the problem presented itself so unexpectedly and so quickly that it confused Rice and deprived him of his ability to exercise his best judgment, and, therefore, they found him guilty of no negligence under all the circumstances. Clearly such findings are against all of the defendant's evidence and per-

haps against some of the evidence presented by the plaintiff's witnesses. And although the evidence in the case impressed me otherwise, than it did the jury during and since the trial, I cannot say that the jury's findings are not warranted by evidence in the case. If the motorman was on the front or west end of the car, which was the end opposite to Rice, and he gave no warning or indication of any kind of his intention to back on to the siding, and shot out quickly upon said siding or branch track, then the jury was warranted in finding the defendant guilty of negligence and such finding must be inferred from the verdict of the jury. The conflicting testimony presented in the case was for the jury's determination, and in view of all the circumstances in the case and the jury's verdict, the motion will be overruled.

AND NOW JULY 25, 1921, the motion in arrest of judgment and for judgment non obstante veredicto is overruled, and the prothonotary is directed to enter judgment in favor of the plaintiff for the amount of the verdict, upon payment of the jury fee.

Setzer vs. City of Pottsville

Municipalities - Police powers - Regulation of autobusses
- Acts of July 26, 1913, P. L. 1374, and June 1, 1915, P. L. 685.

The Act of July 26, 1913, P. L. 1374 (Public Service Company Law) and the Act of June 1, 1915, P. L. 685, giving to cities the power to regulate and license certain motor vehicles, are not repugnant nor inconsistent. The provisions of the two acts, so far as they relate to the same subject, are not irreconcilable and there is no express repeal in the latter act.

An ordinance passed under the provisions of the Act of June 1, 1915, P. L. 685, designating certain streets on which interurban busses should be operated, and forbidding such operation upon other streets of the city, is not an unreasonable exercise of the power conferred in that act, nor does it conflict with the provisions of the Public Service Company Law. No individual has the right to operate as a common carrier, a motor vehicle for the transportation of persons and property without first obtaining from the Public Service Commission a certificate of public convenience, but the authority to designate the city streets over which such motor vehicle shall operate is by the Act of 1915 vested in the municipality.
Superior Court. Affirmed.

Bill in equity for injunction to restrain defendant from enforcing against the complainant an ordinance of the City of Pottsville, passed June 3, 1919, regulating autobusses, taxicabs, etc.

The court dismissed the bill. Complainant appealed.

Edmund D. Smith, for appellant, cited: *Turtle Creek Borough v. Pennsylvania Water Company*, 243 Pa. 415; *Bellevue Borough v. Ohio Valley Water Company*, 245 Pa. 114; *New York Water Company v. York*, 250 Pa. 115; *Scranton Railway Company v. Fiorucci*, 66 Pa. Superior Ct. 475; *In re Troy Auto Car Company*, P. U. R. 1917 a-700; *Allegheny Valley Street R. Co. v. Greco*, Pa. P. U. R. 1917 a-723; *Southern Pennsylvania Traction Company v. Hartel* Pa. P. U. R. 1917 c-627.

Morris H. Spicker, City Solicitor, for appellee, cited: *Philadelphia Jitney Assn. v. Blankenburg et al.*, 24 D. R.

1000; Scranton Railway Co. v. Fiorucci, 66 Pa. Superior Ct. 475; City of Easton v. Miller, 265 Pa. 25.

PORTER J., February 28, 1920.

The Public Service Commission, on September, 21, 1916, issued to the plaintiff a certificate of public convenience authorizing him to operate, as a common carrier of passengers, a line of motor busses between the Borough of Minersville, and the City of Pottsville, including a certain designated route in said city. He continued to operate said vehicles from the date of the certificate until June 3, 1919, when the city duly passed an ordinance designating certain streets on which interurban busses should be operated and forbidding such operation upon the other streets of the city. The enforcement of this ordinance would render it necessary to change a part of the route over which the plaintiff operated his line of vehicles within the limits of the city; in other words, the route designated by the ordinance was, in some respects, different from that specified by the certificate of public convenience under which the vehicles had been operated. The plaintiff filed this bill to restrain the city from enforcing the ordinance. The court below, upon the filing of the bill, issued a preliminary injunction and fixed a day for a hearing upon a motion to dissolve the the same and after a hearing upon said day entered an order dissolving the preliminary injunction. The plaintiff appeals from that order.

The plaintiff contends that it was not within the power of the city to enact an ordinance which would require him to operate his motor vehicles upon a route within the city, different from that designated by the certificate of public convenience, issued by the Public Service Commission. He relies upon the Public Service Company Law, Act of July 26, 1913, P. L. 1374, and in his argument thus states his position: "The contention of the appellant is that the authority of the Public Service Commission is superior and its orders and regulations, conferring the privileges stated on the appellant, are binding alike upon him and the city."

This argument completely ignores the authority conferred upon the city by the Act of June 1, 1915, P. L. 685, the material part of which is as follows: "That each city may regulate the transportation by motor vehicles (not operated on tracks) of passengers or property, for pay, within the limits of the city. In such regulation the city may impose reasonable license fees, make regulations for the operation of vehicles, the rates to be charged for transportation, and may designate certain streets upon which such vehicles, if operated, must be operated." This statute was enacted subsequently to the approval of the Public Service Company Law, and if there is any conflict between them the later statute must, of course, prevail. We have, however, held that there is no conflict between the statutes, that they must be construed together: *Scranton Railway Co. v. Fiorucci*, 66 Pa. Superior Ct. 475. No individual or company has the right to operate, as a common carrier, a motor vehicle for the transportation of persons or property, without first obtaining from the Public Service Commission a certificate of public convenience, but the authority to designate the routes over which such motor vehicles shall operate is by the Act of 1915 vested in the city. The Public Service Company Law did not make the municipalities public service companies, and cities and boroughs, acting strictly as such, are unaffected by it in the exercise of their functions and powers and in the performance of their municipal duties: *City of Easton v. Miller*, 69 Pa. Superior Ct. 554; 265 Pa. 25. It cannot, therefore, be said that the city did not have power to enact a general ordinance regulating the subject-matter with which we are now dealing. The Act of 1915 conferred upon cities power to pass ordinances of a specific and defined character, to "designate certain streets upon which such vehicles, if operated, must be operated." When the legislative grant is of this specific character an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if passed under the incidental power of the municipality, or

under a grant of power general in its nature. "In other words, what the legislature distinctly says may be done, cannot be set aside by the courts because they deem it to be unreasonable or against sound policy:" *Ligionier Valley R. R. Co. v. Latrobe Boro.*, 216 Pa. 221; *Mahanoy City Boro. v. Hersker*, 40 Pa. Superior Ct. 50. The court below very properly, in view of the condition in which the record then stood, refused to continue the preliminary injunction.

The order of the court below dissolving the preliminary injunction is affirmed and the appeal dismissed at the cost of the appellant.

Cohen & Feinstein v. Fried

Practice, C. P. - Affidavit of defense - Sufficiency.

In an action to recover the price of a bill of goods, an affidavit of defense which avers that the bill was not due when the suit was brought is sufficient to prevent judgment for want of a sufficient affidavit of defense.

Supreme Court - Reversed.

The plaintiff instituted an action of assumpsit on a book account on May 14, 1920, and filed a statement on the same day. The defendant in his affidavit of defense averred that the bill was not due when suit was brought.

Rule for judgment for want of a sufficient affidavit of defense. Before KOCH, J.

The court made absolute the rule. Defendant appealed.

R. P. Swank, for appellant.— Summary judgments are in derogation of the right of trial by jury and should be confined to cases where the plaintiff's right is clear: *White Co. v. Quin*, 71 Pa. Superior Ct. 404; *Shaefer v. Lange*, 37 Pa. Superior Ct. 617.

J. H. Garrahan, for appellee.

TREXLER, J., March 5, 1921:

The plaintiffs in their statement seek to recover for the following bill of goods. "2 Pcs. Scrim, 119 yds., @ 18.2 . . . \$22.01, 1 Pc. Linen, 100 yds., @ 40 . . . \$40.00, 1 Pc. Pink Linen, 40 yds., @ 40 . . . \$16.00, 1 Pc. Black Voile, 40 yds., @ 35 . . . \$14.00, 11 Pcs. Fancy Voile 367 yards, @ 65 . . . \$238.55, 4 Pcs. Voile, 253 $\frac{3}{4}$ yds., @ 26 . . . \$60.76, 5 Pcs. Fancy Voile, 144.2 yds., @ 1.10 . . . \$158.95 \$550.27 Terms:—As had 90 days net."

The defendant filed three affidavits of defense. The lower court held the affidavits insufficient. We have come to the conclusion that disregarding the other matters set forth, one defense urged, that suit was brought before the bill was due, is sufficient to prevent judgment.

In his first affidavit the defendant states he gave an order not setting out the items, and alleging that the bill was to be dated March 15, 1920, and due June 14, 1920, ninety days thereafter. In his supplementary affidavit he states that the plaintiffs' salesman duly authorized sold to him 2 pieces of scrim, 2 pieces of linen, and 21 pieces of voile, and agreed that the bill was to be dated March 15, 1920, payable June 14. It will be observed that the above goods are of the identical quantities and kind as in plaintiff's statement although not particularly itemized. This would seem to identify the goods concerning which the allegations as to the due date refers. If, however, there still remains a doubt on the subject the third affidavit resolves it. The defendant there alleges an offer of compromise after suit brought of the return of some of the goods and payment of the remainder, and every item in plaintiff's bill is therein set forth, and the date from which interest is calculated is June 14, 1920, the same date as in the other affidavits. Thus the defendant has consistently claimed that the bill was not due when suit was brought. On this subject there is no contradiction in the successive affidavits.

The judgment is reversed and the record remitted to the court below with a procedendo.

Bittenbender Co. vs. Wolf Creek Coal Co.

Foreign corporations - Action at law - Judgment - Motion to open - Petition - Defense.

Where a foreign corporation is sued by summons served upon the Secretary of the Commonwealth as its lawful attorney and a judgment entered in due course such judgment will not be opened upon petition alleging want of knowledge of the action but failing to set up any defense.

Issue to open judgment. No. 282, July Term, 1920.

P. B. Roads, for rule.

G. H. Gerber, contra.

KOCH J. March 7, 1921.

The defendant is a foreign corporation but is registered in the office of the Secretary of the Commonwealth, and George D. Thorn, chief clerk and party in charge, is its lawful attorney upon whom all lawful process may be served. Upon this suit being brought service was made upon said attorney, and, defendant having taken no steps to protect itself, judgment was in due time entered against it for the sum of \$1531.64. In its petition for the present rule the defendant avers that it had received no notice of any character whatsoever of this suit and that it only became aware of it through an attachment execution served upon the Cullen Fuel Company, as garnishee, and it now claims that judgment was improperly obtained, alleging that the statement of claim is insufficient to have required an affidavit of defense on the part of the petitioner for the following reasons:

"1. The said statement of claim does not set forth a demand as having been made upon your petitioner for payment of said claim and your petitioner's refusal to pay the same.

"2. No authority is set forth to show that the attorney making affidavit to the said statement was authorized

to make affidavit thereto on behalf of the Bittenbender corporation, plaintiff.

"3. The alleged copy of plaintiff's original account with your petitioner attached to the said statement of claim is not sufficiently specific and clear to apprise your petitioner as to what your petitioner is alleged to have received in the matter of the alleged sale from said plaintiff to your petitioner."

In the third paragraph of the statement of claim, we find it averred that "The plaintiff sold and delivered to the defendant, as its special instance and request, certain goods and merchandise, to wit: Steel and coil transmission rope, at the times and in the amounts specified in the copy of plaintiff's original account with the defendant, taken from the plaintiff's book of original entries, which is hereto attached and made a part hereof, all of the value of one thousand five hundred and forty-nine dollars and eighty-eight cents." And the statement concludes "which sum the defendant has neglected and still neglects to pay, wherefore plaintiff brings suit." Quoting it entirely as we find it attached to the statement, the so-called copy "of plaintiff's original account with the defendant," is the follows:-

"Sept 11th, 1918.

100 Sheets No. 10 B. A. Steel 24in. x 120 in.	11288 \$6.63	748.40
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100 Sheets No. 14 B. A. Steel 24 in. x 120 in.	6064 \$6.73	408.10
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Oct. 30th, 1918.

1 coil 1½ Transmission Rope	894 \$.44	393.36
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\$1549.88"

Omitting the place and the jurat, the affidavit to the statement is as follows:-

"H. W. Mumford, being duly sworn according to law, deposes and says that he is attorney for the plaintiff, a corporation, that he has knowledge of the facts set forth in the plaintiff's statement, and that the facts set forth

are true."

I know of no rule requiring demand to be made before bringing suit on a book account. The bringing of the suit is itself a demand. Hence, the first reason for this rule fails.

By the ninth section of the "Practice Act, nineteen fifteen," it is required, "That a plaintiff's statement of claim shall be sworn to by the plaintiff or some other person having knowledge of the facts, and, if there be an attorney, shall be signed by his attorney."

In *Hutchinson v. Woodwell*, 107 Pa., 509, 518, the Supreme Court, in interpreting a rule providing that all affidavits required by the rule "may be made by the party or his attorney," said: "This clearly implies that the affidavit of claim shall be made by some person who has some knowledge of the facts to which he swears. If not made by the party, but by an agent, then the fact of his agency should in some manner, be averred in the affidavit. A mere stranger, in no manner connected with the party or with the case, and without alleging any authority to act for the party, cannot make the affidavit required.

In the case before us the affiant swears that he is the attorney of the plaintiff and that he has knowledge of the facts set forth in the plaintiff's statement, and that the facts therein set forth are true, and this seems to me to meet all the requirements so far as affiant is concerned. Mumford not only makes the affidavit but he has also signed the statement as one of the attorneys for the plaintiff. He, therefore, cannot be said to be "A mere stranger in no manner connected with the party or with the case."

It has not been pointed out to us wherein the alleged copy of the plaintiff's original account is not sufficiently specific and clear to apprise the defendant as to what it received from the plaintiff. The third paragraph of the statement is that steel and coil transmission rope were sold and delivered to the defendant at its special instance and request, and, "at the times and in the amounts specified in

the copy of the plaintiff's original account with the defendant, taken from plaintiff's book of original entries," and which is attached to the statement and made a part thereof. Taking the two together, it seems clear to me that certain steel and coil transmission rope, well known to the trade, were sold and delivered by the plaintiff to the defendant, at its special instance and request.

But is plaintiff's statement of claim, taken as a whole, "insufficient to have required an affidavit of defense?" If it be insufficient to have required an affidavit of defense, then it is insufficient as the basis for a judgment, "as all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time honored forms." *Fritz v. Hathaway*, 135 Pa. 274, and *Murphy v. Taylor*, 173 Pa., 317. In the absence of an affidavit of defense it is plaintiff's duty to show that he has complied with all the requirements of the rule necessary to entitle him to a judgment. Otherwise, the judgment cannot be sustained. *Gottman v. Shoemaker*, 86 Pa., 31; *Strock v. Commonwealth*, 90 Pa. 272; *Commonwealth v. Magee*, 24 Superior Court, 329. Our practice act requires that "every pleading shall have attached to it copies of all notes, contracts, book entries, etc." A copy of book entries is, therefore, a necessary appendix to the statement, and it means a correct and complete copy which should be made to appear either on its face or by categorical averments. *Fritz v. Hathaway*, 135 Pa., 274, 279. Here we have a copy of purported book entries which do not mention the defendant's name, and, in that respect, is similar to the account in the case of *Wall v. Dovey*, 60 Pa., 212, in which it was said that the book entries "must fasten on their face, if genuine, a liability of the defendant before he can be required to deny the genuineness or set up what may be matter of defense. In this case, the bank entries contain no charge against the defendant. They could not be given in evidence even with ancillary parol proof that they were in-

tended to charge him. The plaintiff, or clerk, who made them could not settle the defect by his oath." But in the case of Fritz v. Hathaway, 135 Pa. 274, where the copy of the claim failed to name the defendant, we are told that the appendix "may be helped out by averments; so that the failure to name the defendant therein is no longer a fatal defect as it was under the former affidavit of defense law, as held in Wall v. Dovey, 60 Pa., 212." See also Bethlehem Steel Co., v. Topliss, 249 Pa., 417, 420. Categorical averments, therefore, in the statement itself, as already quoted, may help out the alleged copy of the book entries, because the averment is that it is, "a copy of plaintiff's original account with the defendant, taken from plaintiff's book of original entries." But the defendant claims that the statement is not self-sustaining, because there is not an averment anywhere that the prices charged are fair and reasonable, or that the defendant has agreed to pay the prices charged. Murphy v. Taylor, 173 Pa. 317. "In actions founded on a book account, such an averment is of the first importance, because the obligation to pay implied by the law does not of itself commit defendant to the payment of a particular sum charged, but to such sum only as may be found to have fair and reasonable value of the labor done or goods furnished." The White Co. v. Quin, 71 Pa. 405. Or there must be, at least, an averment that the amount claimed is justly due. Kamber v. Becker, 27 Superior Court, 266.

We quote from the case just cited, as follows; "The defendant argues that the declaration does not aver a sale of the goods for the regular market prices nor the agreement of the defendant to pay the prices charged. But the declaration does aver the sale and delivery of the goods and the amount for which they were sold and that this sum is justly due and unpaid. Then the copy of the account annexed to the declaration shows a sale by the plaintiff to the defendant with dates, items and amounts and again states that this sum is justly due and owing. We

think the declaration with the copy of the account annexed, makes a prima facie case of the sale, delivery and price of the goods and that it is substantially in harmony with *Bridgeman Bros. Co. v. Swing*, 205 Pa. 479." See also *Ashman v. Weigley*, 148 Pa. 61.

In the first paragraph of plaintiff's statement we find it averred that the sum of One thousand five hundred and thirty-one dollars and sixty-four cents with interest thereon from 30th day of November, 1918 "is justly due and owing by the defendant to the plaintiff" etc., which together with the other averments in the statement and with the matter found in the attached copy of the book account, makes out a case, at least, as strong as that of *Kamber v. Becker*.

The pending rule is to open the judgment and let the petitioner into a defense, but in the petition it is no-where averred that the defendant has a defense and no kind of a defense is even intimated. If there be a defense its nature and character are not indicated at all. If the judgment was improvidently entered, the proper proceeding would be a motion to strike it from the record upon proper averments showing that the statement is not sufficient to sustain the judgment. Nor does the petition account sufficiently for the failure of the defendant to receive notice of this suit prior to the 14th of December, 1920. Under the circumstances, we think we have no right to interfere with the judgment.

AND NOW MARCH 7, 1921 the rule is discharged.

Stahler vs. Moser

Infant - Right to sue - Letters of administration - Revocation - Act of March 15, 1832, P. L. 135. - Act of April 8, 1833, P. L. 249.

An infant cannot act as administrator nor executor and when all persons entitled to administer are under age the register may grant letters to any other fit person, subject to termination as provided by the act of March 15, 1832, P. L. 135.

A minor cannot make a will; act of April 8, 1833, P. L. 249.

The register of wills may revoke letters improperly granted.

Motion to take off nonsuit. No. 307, September Term, 1916.

J. O. Ulrich, for motion.

J. F. Whalen, contra.

KOCH, J. March 21, 1921.

John B. Stahler died on the 22nd. of November, 1910, leaving his last will and testament dated 21st. day of May, 1906, in which he appointed Joseph Barker, executor. At the time of his death Stahler was a resident of the county of Carbon. Roy L. Stahler, a son of John B. Stahler, had his father's will probated at Mauch Chunk in August, 1916 and received letters of administration with his father's will annexed under date of the 5th. of August, 1916, Joseph Barker being apparently dead when the will was probated. Roy L. Stahler was born on the 9th of September, 1896 and was, therefore, less than twenty years old when he received letters of administration with his father's will annexed. On the 18th. of August, 1916, he began this law suit. Sometime after the law suit was started, to wit, in January 1918, the register of Carbon County revoked young Stahler's letters of administration; he was then over twenty-one years old. On the 15th. of July, 1919, the plaintiff obtained new letters of administration. When the trial of this case was had, and, after the plaintiff had rested, the defendant moved for a compulsory non-suit upon the ground that the plaintiff had no right to sue when he

did, because he was then a minor, and, further because his appointment as administrator was later revoked by the Register of Carbon County. The motion was based also on the ground that "the showing of the plaintiff in this case is not sufficient to sustain the plaintiff's claim."

The plaintiff's claim is for \$850.00 with interest from the 18th. of June, 1909 and is alleged to be based upon a loan of \$850.00 by the testator to Mrs. Emma Moser and her husband. Mrs. Moser is a daughter of the testator. The plaintiff's statement contains no averment showing that the amount was to be repaid, nor any averment of a promise to pay within six years of the time when this suit was begun. The defendant filed two affidavits of defence. The first averment in the first affidavit of defence is that, "The said Roy Louis Stahler is not authorized by law to bring this suit, in as much as he is a minor, and, therefore, not entitled to act as administrator." And the sixth averment is: "The appointment of Roy Lewis Stahler as administrator of John B. Stahler was illegal for the reason that the said Roy Louis Stahler was a minor on August 5th, 1916." The affidavit of defence denies the loan and claims the money was "voluntarily given to Emma Moser for her own use and not to be returned." In the second supplemental affidavit of defence the statute of limitations is interposed as a bar.

No one is sui juris in Pennsylvania until he has attained the age of twenty-one years. Such are not entitled to either letters of administration or letters testamentary. Inability of infants continues in contemplation of law until the infant has attained the age of twenty-one years. 2 Kent, 238. So far as letters testamentary are concerned the 23rd. Section of the Act 15th. March, 1832 P. L. 133, provides that, "Whenever all the executors named in any last will and testament or all the persons entitled as kindred to the administration of any decedent's estate shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration as aforesaid to any

other fit person or persons, subject nevertheless to be terminated at the instance of any of the said minors who shall have arrived at the age of twenty-one." Nor can a minor make a will. Act April 8, 1833, section 3, P. L. 249. Where the register improperly grants letters of administration or letters testamentary to one not qualified, he may revoke such letters. *Reigel's Appeals*, 17 W. N. C. 279; *Slomo's Appeal*, 57 Pa. 356. However "An infant may sue by his next friend appointed, at the common law, by the court in which the action is pending, and by our practice without any appointment at all, in order to supply the want of capacity in the infant to afford in his own person a party responsible on the record for the costs; but as the execution of the trust is under the supervision and control of the court, there is no reason why our practice of constituting a *prochien ami*, without the express sanction of the court, should be disturbed. Such a next friend is in the nature of a guardian ad litem, the chief difference being that the former is a curator of the infant plaintiff and the latter of the infant defendant; 1 Tidd. Prac. 69." *Turner v. Patridge*, 3 Penrose & Watts, 172. Nor is infancy a ground for non-suit. It must be pleaded in abatement. *Heft & Hicks v. McGill*, 3 Pa. State Reports, 256, 264.

In *Hardy v. Scanlin*, 1 Miles 87, a minor brought suit using the name of his guardian without his consent, and upon the defendant's application to quash the writ to which the guardian agreed, the court would not quash it, saying "It is the duty of a court to protect the infant so far as to give him an opportunity to be heard; and it is clearly within our power to make such an order as will lead to a trial that shall be fair for both parties. An unwilling guardian might embarrass the proceedings, and, before the defendant can be compelled to plead, there should be an adverse party on record responsible for costs. Though an infant must appear and defend by guardian, yet he may sue either by guardian or *prochien ami*. Co. Litt. 135 b. Without, then making absolute this rule, the court, on ap-

plication of Boyle, will give him leave to withdraw his name from the record; and on the application of Hardy will give leave that the plaintiff's declaration be withdrawn, and the name of a suitable person be substituted as *prochein ami* for that of James Boyle, guardian." And the rule to show cause why the summons should not be quashed was discharged.

I entertain some doubt whether the Register of Carbon County had the power to revoke plaintiff's letters of administration after he had attained his majority in January, 1918. However, he had new letters of administration and had attained his majority long before this case came to trial, and under the authority of *Hardy v. Scanlin*, *supra*, I am inclined to think that the case could not be non-suited upon the ground of the plaintiff's infancy at the time when the suit was brought. However, the non-suit was grantable upon the second ground because the plaintiff failed to show a loan from the testator to Mrs. Emma Moser. The evidence is insufficient to support the claim of the plaintiff, and, therefore, a non-suit was properly granted. Besides, if the alleged loan was made on the 18th. of June, 1909, the statute of limitations bars a recovery in the absence of sufficient evidence of a new promise within the statutory period. The praecipe for the summons in this case was filed on the 18th of August, 1916, or more than seven years after the money was received by Mrs. Moser. In view of the interposition of the statute of limitations, the plaintiff was called upon to prove as a part of his case, a new promise within six years of the time of the bringing of the suit, and, having failed to do so, the motion for judgment of non-suit on that ground alone would have been tenable.

A judgment right in substance will not be reversed on a technical error at the instance of a party who could gain nothing thereby. *Jackson v. Myers*, 260 Pa. 488, 491.

AND NOW MARCH 21, 1921, the motion to strike off the judgment of non-suit is overruled at the costs of the plaintiff.

McGonigle et al., vs. St. Clair Coal Co.

Equity - Injunction - Waters - Wrongful diversion.

On a bill in equity for an injunction to restrain the unlawful diversion of water from one stream, and its discharge into another stream in a different watershed, and the consequent damage to the plaintiff's property, it is error not to grant such injunction.

Superior Court. Reversed

Bill in equity to restrain the diversion of the waters of a stream. Before BERGER, J.

The court dissolved the preliminary injunction. Plaintiffs appealed.

Edmund D. Smith and J. M. Boone, for appellants.

Roscoe R. Koch and John F. Whalen, for appellee.

HEAD, J. March 5, 1921:

It is true that when this case was formerly before this court (71 Pa. Superior Ct. 480), but a single question was decided. That question, however, involving as it did a challenge to the equity jurisdiction of the court below, necessarily demanded at the hands of that court an ascertainment of the material and controlling facts in the case. The learned chancellor correctly understood his duties in that respect, and made detailed findings of the important facts established by the testimony produced at the hearing. To the facts thus ascertained he applied what he regarded as the proper legal principles, and thus deduced the conclusion the complainants in the bill filed had an adequate remedy at law to recover damages for the injury they had sustained. Before the passage of the Act of June 7, 1907, P. L. 440, that conclusion would have resulted in a dismissal of the bill without more. But following the provisions of the statute just referred to, the learned chancellor entered a decree dissolving the preliminary injunction that had been granted and certified the case to the court of common pleas, so that the legal rights of the parties might be determined

in the trial of an action at law. It was from that order the former appeal was taken, as the statute provided for such an appeal. This statement makes it apparent, especially in the light of what afterwards followed, that practically the whole of the case was before us when we formerly considered it, even if the learned chancellor had been mistaken in his conclusion that a court of equity was without jurisdiction. But if it had appeared, from the findings of fact and the record as then made up, that the plaintiff, for other reasons, had lost his right to equitable relief, this court would not have reversed, because the appellant would not have been aggrieved by an order giving him an opportunity to go into a court of law, when it was apparent he had no right to recover in any court. This court, therefore, in the discharge of what it conceived to be its duty in the premises, fully stated in the opinion filed, all of the important facts in the case as then developed by the testimony. It is true that testimony was taken on the hearing of a motion to continue or discharge the preliminary injunction that had been entered, but it was stipulated all of that testimony should be thereafter considered as if taken on final hearing. This court reversed the order made by the court below already referred to, reinstated the preliminary injunction that had been dissolved, and remitted the record to the court below with a procedendo. Thereafter no further testimony was offered by either party to require any modification or reversal of the findings of fact theretofore made by the learned chancellor. All that happened in the court below after the record had gone down, appears to have been a lengthy discussion between court and counsel as to the proper interpretation of the decree of this court. We did not think then, we do not think now, it required any interpretation. All that was necessary was that it should be executed according to its plain terms and undoubted meaning. It was open to the complainants in the bill to offer any additional testimony they chose to offer. Indeed it was even suggested in the opinion of this court that they

amend their bill of complaint so as to include the subject of damages and thereafter offer testimony to support a decree ascertaining those damages. That suggestion was unheeded for reasons no doubt satisfactory to the complainants and their counsel. The respondent, on the other hand, was also at liberty to offer additional testimony for the purpose of having the findings of fact theretofore made modified or set aside, but no such testimony was offered, and the record was finally closed in substantially the same condition as to the facts that existed when we formerly considered it. The learned court below then, in the exercise of his duty to enter a final decree, reached the conclusion the injunction should be finally dissolved and the bill dismissed because of the laches of the complainants. From that decree this appeal comes.

Let us briefly restate what we consider to be the controlling findings of fact in the case, as the learned chancellor determined them. 1. That the defendant diverted the water of Mill creek into the watershed (of Wolf creek) in which the plaintiff's property is situated, by conducting the water of Mill creek to a tank, from which it pumped the water into its breaker and used it for washing coal, thence to a sump, thence to a slush dam, whence it ran and was discharged through a ditch maintained by the defendant into the watershed of Little Wolf creek, and thence on to the property of the plaintiff. 2. That the water of Mill creek so diverted into the Little Wolf creek watershed and onto the property of plaintiff, carried muck or culm that was deposited on the property of the plaintiff. 3. That except for the diversion of the waters of Mill creek by the defendant, the water of the said creek could not flow into the watershed of the Little Wolf creek, nor upon the property of the plaintiff. 4. That in December, 1917, the water of Mill creek, so diverted and polluted with muck, culm or coal dirt, flooded the plaintiff's property to the depth of from one to three inches and rendered the plaintiff's house uninhabitable, etc. 5. That such floodings and deposits occurred on the 7th,

8th, 9th, 10th, 11th, 12th, 14th and 16th days of January following.

A preliminary injunction was awarded on the 21st of January, 1918, and the findings of the court, with a decree nisi, were filed upon the 27th of May, 1918, as to which date the learned chancellor further found that since the granting of the injunction the plaintiff's property has not had any water cast upon it from the defendant's operation, and the water of the Little Wolf creek has flowed, impregnated with sulphur it is true, but clear of muck, culm and coal dirt.

Upon the facts thus found, the learned court predicated the following conclusions of law: 1. "That the diversion by the defendant of the water of Mill creek from its natural channel into the channel of Little Wolf creek is without right and illegal." 2. "That the increase by the defendant in the flow of water in the Little Wolf creek and the pollution by the defendant of the water naturally flowing in Little Wolf creek and on to or through the property of the plaintiff is without right and illegal."

Now as we have already stated all of these facts remained in the record at the time of the final hearing, with the same compelling force as they had at the time they were found by the chancellor. It has already been determined by this court they properly and completely grounded the jurisdiction of a court of equity to furnish relief unless such relief should be denied for some reason not then apparent to this court in its examination of the record as it came from the court below. As already stated, upon a final consideration of the entire case, the learned court below dismissed the bill on the ground the plaintiffs had lost their right by laches. No new facts upon that subject appear. No new testimony was offered. That question was in the case when it was formerly considered upon the same findings and record we now have before us. To demonstrate that this subject received full attention of this court at the time, we quote from the opinion then filed: "It it be true, as

the court below finds, that some time ago another coal company, whose works were situated higher up the stream, diverted some of the water of Mill creek into the watershed of Wolf creek and that plaintiffs did not complain, we are unable to perceive how it can be concluded from that fact the plaintiffs have lost their right to complain of the unwarranted action of the defendant. The earlier diversion may have been so insignificant in quantity or the place where it occurred so far removed from the plaintiff's property that no substantial injury to the plaintiffs resulted. We do not think they were obliged to assert their naked right as riparian owners, if they had such right where they suffered no substantial injury. The diversion complained of in the present case has been going on but for a comparatively short period of time. The injuries complained of in the bill were the first substantial ones that were done to the property of the plaintiffs. We are unwilling to say that their failure to move earlier, has brought about the result that they have estopped themselves to complain when a serious injury has developed from what at first may have appeared as but the invasion of a naked legal right." We do not think that because the plaintiff property owners saw the defendant build a slush dam up on its own property lying above them, they were bound to anticipate the injurious results that first became apparent just before this bill was filed. They were not bound to foresee that the walls of the slush dam would not be constructed sufficiently tight to hold the contents that were brought to them; nor that the defendant might in time permit the culm, silt, etc., that would be deposited therein to so far fill up the dam or tank that its contents might overflow before the precipitation would be completed. Indeed we see nothing in the record now, as we saw nothing then, to justify the conclusion that the mouths of the plaintiffs should now be closed to assert that the unlawful diversion of the water of Mill creek by the defendant into the watershed in which the property of the plaintiff was situated, had been so man-

aged by the defendant that it finally resulted in substantial injury to their property.

We may advert to one other consideration that appears to have operated to the injury of the plaintiff in the final consideration of the case in the court below. It may be true the defendant constructed its slush dam without negligence and operated it in the same way and that the operation of that dam is useful in the defendant's work of preparing its coal for market. None of these considerations are adequate in the eye of the law to justify the defendant's act in diverting water from one stream to another in a different watershed to the established injury of these plaintiffs. And this is especially true in the light of the findings of the learned judge below, that no overflow had occurred since the preliminary injunction had been granted, and that there exists in the record no finding and no evidence to support a finding, that whatever change had been made by the defendant company during the continuance of the injunction, had been made at a prohibitive cost, or that because of the injunction its mining operations had to be entirely suspended. We therefore said in our former consideration of the case, "It appears that upon the granting of the preliminary injunction the defendant so modified its plan of operations that the water taken from Mill creek was returned to the channel of that stream. This was the status that existed at the time the order appealed from was entered. It has not been shown, to our satisfaction, that such modification in the conduct of the defendant's business involved any considerable expense or was productive of any serious disturbance in the prosecution of its work. Since that change no injury to the plaintiff's property has resulted."

That language may be as truly predicated of the condition of the record as it is now before us, as it was when it was written. We can see no reasons for anticipating any difficulty in formulating a proper decree. Of course no decree granting any relief is before us for our consider-

ation. Certainly these plaintiffs would not be entitled to a decree that would go no farther than to restrain the defendant from diverting the waters of Mill creek from their natural channel. The plaintiffs are not riparian owners along that stream, and they have no interest, and do not pretend to have any, in the extent to which the defendant depletes the flood of the waters therein. It is not an injunction to restrain that action merely they seek. Their only interest arises when the waters so diverted from a watershed in which they are not concerned, are wrongfully turned into another watershed on which their property lies, and thus made a source of injury to their property. It is against the constant recurrence of such injury they have sought the aid of a court of equity. We are all of opinion they are entitled to the protection of a decree.

The decree of the court below dismissing the plaintiff's bill is reversed and set aside, the bill is reinstated and the record is remitted to the court below with direction to enter a decree that will grant the proper relief in accordance with the principles here and heretofore determined by this court. The appellee for costs.

Parlovich v. The Philadelphia & Reading Coal and Iron Co.

Workmen's Compensation Law - Final receipt - Practice - Setting aside settlement - Injury to eye - Refusal of surgical treatment - Amending Act of June 26, 1919, P. L. 642.

The Workmen's Compensation Board is not obliged to follow the rules of courts in law and equity in determining whether or not to set aside a "final receipt." Where such receipt is given and the condition of the claimant changes, the Workmen's Compensation Board may go behind the agreement and consider the case on the merits.

Mere delay for three days in applying for treatment is not a refusal to accept reasonable surgical aid, where the testimony of the employer's surgeon was that the injury might have been no less serious even if it had been treated immediately.

The Amending Act of June 26, 1919, P. L. 642, was not designed to substantially reenact the old law as to contributory negligence nor to deprive an employee of compensation because he did not follow all the directions of all the physicians and surgeons deputed to look after him. Its purpose was to allow a defense by the employer where injury or larger incapacity are entirely the result of unwillingness of the employee to receive treatment.
Superior Court. Affirmed.

**Appeal from the Workmen's Compensation Board.
Before BECHTEL, P. J.**

The court affirmed the award of the Workmen's Compensation Board. Defendant appealed.

John F. Whalen and George Ellis, for appellant.

Roger J. Dever, for appellee.

HEAD, J., March 5, 1921:

The disposition of this appeal involves the consideration of two questions: (1) Was the injured employee, the appellant, estopped to make any further complaint by the settlement agreement into which he entered with the defendant company, and which was afterwards set aside by the Workmen's Compensation Board? (2) Was the conduct of the complainant after he had sustained the injury, of such character that the employer may now assert it has been relieved from the duty to compensate him for the injury?

1. The complainant suffered an injury to one of his eyes in the course of his employment by the appellee company. He received some compensation as if for a temporary injury during a period of a few weeks. He then signed a settlement agreement and what is called a final receipt. This receipt states his account thus: "For compensation, account of disability, under Workmen's Compensation Act of 1915, viz: 6 5-6 weeks, at \$7.96 per week, \$54.39." Then follows: "Received Mar. 5, 1918, of Workmen's Compensation Fund of The Philadelphia and Reading Coal and Iron Company \$54.39 in full of above account." Signed by the mark of the complainant and duly witnessed. In point of fact it later developed that the complainant's eye was destroyed and his sight entirely gone. He filed a petition with the Workmen's Compensation Board asking that body to review the said agreement as provided in section 423 of the Act of 1915 and alleged as the reason for his application "The compensation agreement was executed by mistake in that it fails to provide for compensation for loss of my eye which I am entitled to for the injury in question, as my right eye is blind as result of the injury. And in support of the above allegations I state the following facts: The defendant paid me \$7.31 per week, for 6 weeks and 5 days, when I was asked to sign a paper, showing I had been paid for 6 weeks and 5 days. I cannot read English and signed the paper they offered me, which I understood was for 6 weeks and 5 days compensation, I did not know it was a receipt for full compensation due me."

Section 434 of the Act of 26th of June, 1919, provides, inter alia, "That the board, may, at any time, set aside a final receipt, upon petition filed with the board, if it be proved that such receipt was procured by fraud, coercion, or other improper conduct of a party or is founded upon mistake of law or of fact." Notice was given of the filing of this petition and the employer company answered. The Workmen's Compensation Board, exercising the powers conferred by the provision of the statute we have just

quoted, set aside the agreement and considered the case of the complainant as if such agreement had never been executed. This action of the board is assigned for error.

When we take a broad view of the objects and purposes of the legislature in enacting the legislation that now controls the relation of employer and employee, and the procedure by which the Workmen's Compensation Board is to put into effect the reasons for its creation, we are wholly unwilling to say that, in disposing of the question raised by the petition and answer, the board was obliged to follow the rules prevailing in courts of law and equity to the effect that one who seeks to set aside a writing executed by himself, must produce the testimony of two witnesses or of one witness with collateral circumstances equivalent to the evidence of another. The answer of the employer contains but a simple denial in so many words of the facts set forth in the petition. It does not deny the allegation that the complainant was unable to speak or read the English language. It does not deny the allegation that the complainant was unable to speak or read the English language. It does not aver the agreement was read and explained to him. The record shows his testimony was taken with the aid of an interpreter. In this state of the record it might not be going too far to say that the petitioner had made out a case that would warrant a decree by a chancellor setting aside the agreement, but it is not necessary to go so far. We content ourselves with the statement that in our judgment the Workmen's Compensation Board cannot be convicted of reversible error because of its determination to go behind the agreement and receipt and consider the case of the complainant on its merits.

2. The major effort of the appellee company was to show that the complainant had lost his right to compensation because of his wilful refusal to accept proper surgical aid and to comply with the directions of the surgeons who proffered such aid. In considering this question it may not be amiss to dwell for a moment on the radical changes ef-

fectured by recent legislation and the broad reasons underlying it. By the Act of June 2, 1915, P. L. 736, the legislature declared, in section 201 of article II, "That in any action brought to recover damages for personal injury to an employee in the course of his employment, it shall not be a defense that the injury was caused in any degree by the negligence of such employee, unless it be established that the injury was caused by such employee's intoxication or by his reckless indifference to danger. The burden of proving such intoxication or reckless indifference to danger shall be upon the defendant, and the question shall be one of fact to be determined by the jury." We are now immediately concerned with the Amending Act of 26th of June, 1919, P. L. 642 (which in this respect did not change the original act) declaring that "If the employee shall refuse reasonable surgical, medical and hospital services, etc., tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal." It was not the legislative purpose by this provision to substantially reenact the old law as to the contributory negligence of an employee. Nor was it intended to deprive an injured employee of any compensation because he did not follow all of the directions of all of the physicians or surgeons who may have been deputed to look after his welfare. The employer company is given an opportunity to make a defense under the provision of the statute quoted. That opportunity is coupled with the obligation on the employer company to show that the injury was entirely the result of the unwillingness of the employee to receive treatment or that such conduct on his part resulted in a larger incapacity than would have been the probable and reasonable result of the original injury.

Now it is clear enough from the evidence that the complainant received a serious injury to his eye in the course of his employment. He declares in his testimony "I did not have a doctor immediately because I did not have time,

because my wife just come from the hospital, had her leg broken." He did go to a doctor on the third day, who sent him to a hospital. He remained in that hospital five days. Then he went to the Pottsville hospital where he remained five weeks under the care of the chief eye surgeon of the employer company. At the expiration of that time he testified that surgeon gave him a note to go home. "I asked him for a note, and he gave me a note to go home I asked him whether he going to cure me and he said you can come two times a week or one times a week."

Now if the burden of proof be upon the employer company to show that the loss of appellant's eye was traceable to his refusal to follow reasonable medical or surgical advice, then we have to say say the record is entirely barren of any such proof. The chief surgeon of the employer company was asked this question: "You cannot say, as a practicing physician, specialist in eye work, that this man's eye would not have been lost for practical purposes, as the result of this injury, even if he had received treatment, can you?" The answer was: "No, sir, you cannot, because some eyes will go right to the bad for you from the beginning, but the majority of them get well." Upon testimony no stronger than that, we are not willing to say that the referee, the Workmen's Compensation Board and the court of common pleas all fell in error. It appears to us on the contrary that the safe and sound conclusion to be reached by a study of this record is that the employer company, seeking to defend against this claim, was unable to show that the loss of the complainant's eye resulted from his refusal to accept reasonable surgical aid.

We are all of the opinion, therefore, that the assignments of error must be overruled. The appeal is dismissed at the cost of the appellant.

St. Joseph's Lithuanian Roman Catholic Church's Petition

Church law - Title to real estate - Lay members - Acts of April 26, 1855, P. L. 323, and May 20, 1913, P. L. 242.

1. Under section 7 of the Act of April 26, 1855, P. L. 323, 330, and its amendments, the trustees of a church property hold but the legal title thereto the entire beneficial interest being in the congregation.

2. All the lay members of a church are entitled to vote upon questions relating to the control and disposition of the church property.

3. Nonpayment of dues will not deprive lay members of this right; so long as membership continues, the right likewise continues.

4. Not decided, whether, since the church property was purchased before the passage of the Act of May 20, 1913, P. L. 242, the "control and disposition of the lay members" must be "exercised in accordance with and subject to the rules, regulations, usages, canons, discipline and requirements" of the religious denomination with which the church is connected.

5. This court will not consider defects which might have been amended in the court below, had they been called to its attention. Supreme Court. Reversed.

Petition for leave to borrow money. Before BECHTEL, P. J.

The court entered a decree in accordance with the prayer of the petition. John Zernosky, a member of the congregation, appealed.

F. J. Walsh, A. D. Knittle, J. F. Whalen, M. J. Ryan and A. A. Hirst, for appellant.

A religious congregation is from its very nature a quasi corporation and as such must be governed in its internal actions according to the rules applicable to any corporation and a corporate meeting therefore must be duly convened before action can be taken to bind the corporation: *Phipps v. Jones*, 20 Pa. 260; *Com. v. Read*, 2 Ashmead 261; *Phila. Straw Braid Sewing Machine Co.*, 6 Pa. C. C. R. 65.

Otto E. Farquhar, Roscoe R. Koch and Arthur L. Shay, for appellees.

The trustees are the proper medium through which

the congregation acts and another faction of the church would not nullify their authority or direct that action be taken in some other way: *Krauczunas v. Hoban*, 221 Pa. 213; *Ryan v. Dunzilla* 239 Pa. 486; *Beck v. Dech*, 231 Pa. 636.

JUSTICE SIMPSON, March 14, 1921:

St. Joseph's Lithuanian Roman Catholic Church of Mahanoy City, Pennsylvania, is an unincorporated religious society, part of whose property is used for a cemetery, and upon the balance has been erected a church, parish house, parsonage and other buildings. Appellees, as trustees of the property, presented a petition to the court below, asking leave to borrow \$21,000 for its repairs and improvement; appellant, having been given leave to intervene, filed exceptions and an answer, both of which were dismissed and the prayer of the petition granted; thereupon this appeal was taken.

The petition avers that the property consists of five lots purchased between 1889 and 1906, the legal title thereto being held by petitioners as trustees; that notice of a special meeting of the congregation was given by advertisement in two newspapers and by posting and distributing circulars, but the extent thereof was not stated, nor was it averred or proved that, by the means employed, the lay members of the congregation did or were even likely to have been advised thereof. It is further averred that at the meeting "It was unanimously resolved that your petitioners be authorized to make application to the court" for authority to make the loan; but it is not stated how many were present, how many voted, or what constituted a quorum. Since the petitioners are but dry trustees holding the legal title, and "the entire beneficial interest is in the congregation to be used by it, at its discretion, for such purposes as the law allows" (*Krauczunas v. Hoban*, 221 Pa. 213; *Ma-zaika v. Krauczunas*, 233 Pa. 138; *Carrick v. Canevin*, 243 Pa. 283), and since also this limitation extends to forbidding the use of the church money, even for religious purposes,

without the consent of the congregation (*Tuigg v. Treacy*, 104 Pa. 493, 500), it follows that the petition was inadequate and doubtless would have been so held by the court below had objection been specifically made on this ground. Upon this appeal, however, we need not consider this matter, since there is a fatal defect covered by one of the exceptions, the dismissal thereof being assigned as error.

In the advertisement of the meeting, as it appears in at least one of the newspapers, it is stated: "Members who have paid dues for 1919, only, allowed at this meeting." This is in direct violation of section 7 of the Act of April 26, 1855, P. L. 328, 330, and the amendatory Acts of June 8, 1887, P. L. 298; May 1, 1907, P. L. 132, and May 20, 1913, P. L. 242, each of which provides: "Section 7. Whensoever any property, real or personal, shall hereafter be bequeathed, devised, or conveyed to any ecclesiastical corporation, bishop, ecclesiastic, or other person, for the use of any church, congregation, or religious society, for religious worship or sepulture, or the maintenance of either, the same shall be taken and held subject to the control and disposition of the lay members of such church, congregation, or religious society, or of such constitutional officers or representatives thereof, as shall be composed of a majority of lay members, citizens of Pennsylvania, having a controlling power according to the rules, regulations, usages, or corporate requirements thereof, so far as consistent herewith."

Under these acts, the property of this congregation always has been and still is "held subject to the control and disposition of the lay members;" and it necessarily follows that,—since a meeting limited to those members who had "paid dues for 1919," was not a meeting of all the "lay members of such church," but only of a part thereof,—the exclusion of the balance of the membership rendered the loan resolution null and void. Doubtless a congregation, by appropriate action taken in a proper way, can provide for a loss of membership by those who will not support

the church according to their means; but so long as membership continues, the statute gives to the lay members, one and all, a voice and vote in the "control and disposition" of the church property; they cannot be held to the duties of membership, and at the same time be deprived of the statutory rights arising therefrom. This conclusion necessitates a dismissal of the petition as well as a reversal of the order made.

The main question, viz: whether "the control and disposition of the lay members," is limited, as to these properties, by the provision of the Act of 1913, that it must be "exercised in accordance with and subject to the rules, regulations, usages, canons, discipline and requirements" of the Roman Catholic Church, cannot be decided in this case for want of proper proofs; and we refer to it only to avoid the implication that it was passed upon and overruled.

The decree of the court below is reversed and the petition is dismissed, at the cost of petitioners.

Beadle vs. Borough of Mahanoy City

Negligence - Proximate cause - Maintaining traffic pole on street.

Where a borough maintains a traffic pole upon a street and fails to properly illuminate it, it is guilty of negligence but that must be the proximate cause of an accident in striking it; where a traveler is blinded by the lights of an approaching automobile and for that reason strikes such pole there can be no recovery because the pole was not the proximate cause of the accident.

In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

Motion to take off nonsuit. No. 301, September Term, 1920.

R. A. Reick, for motion.

T. H. B. Lyon, contra.

KOCH, J. March 21, 1921.

About the year 1916 the defendant borough placed a traffic pole at the intersection of 8th. and Centre Streets. Centre street is fifty feet wide between the curbs and is the principal business street in said borough. Eighth street is thirty feet wide between curbs. An electric railway track occupies the middle of Centre street, which extends east and west. The said traffic pole stands in the centre of Eighth street and several feet north of said trolley track. The diameter of the pole at its base is twelve inches and it is about sixteen feet high. It is surmounted with a glass lamp of four sides on each of which is found the words "Keep to the right." At night the lamp is illuminated with an incandescent electric light. On the night of the 20th. of June, 1920, the lamp was not illuminated but there were some incandescent lights on the two streets within several hundred feet of their intersection. That night the plaintiff in his Ford motor car, in company with two other gentlemen and two ladies, drove past said pole east on said Centre street and, when four squares beyond it, he turned around and came back on said Centre street and ran into said pole. He was proceeding slowly, but his car was damaged quite considerably; and he then brought this suit to recover his loss in damages. The plaintiff was unfamiliar with the streets and was not aware of the existence of a traffic pole, and he did not notice it when passing it going east, nor did he see it when he was proceeding west. The plaintiff testified: "I was driving up the street in Mahanoy City and went up to the end of the brick about a square or so beyond the brick and I turned around and was coming down. While coming down there was a machine coming towards me and I could not see anything and I was just driving very slow and I collided right into this pole." He told the borough's chief of police, whom he called as one

of his witnesses, that the car that was coming toward him "had blinding lights" and that they "blinded him and obstructed his view causing him to hit this traffic pole."

The circumstances under which the accident happened are made to appear in the plaintiff's own testimony as follows:-

"Q. When you met this other car did you turn to the right or turn to the left? A. I did not turn at all. I just drive straight through. Did not know there was anything there in front of me. Q. You say the car came towards you? A. It came driving up the street and he sort of made a bend and blinded my eyes. Q. Made a bend and blinded your eyes? A. Yes, sir. Q. How long was that just before you went into the pole? A. It was right away. I just kept going slowly and I just hit that way and that is all I know. Q. No, but those lights blinded you. Just a brief time before you went into the pole? A. Yes, sir, just a brief time. Q. And that is the reason you could not see the pole, and could not see the pole because you were blinded with the lights on that other car, is that not a fact? A. I do not know how you the pole. I am talking about the pole itself. That is the reason you could not see the pole because you were blinded with those lights, is that not so? A. If there had been a light on the pole I could have seen the pole. Q. Just answer my question. Is it not a fact that you did not see the pole because you were blinded with the lights on that other car, is that not a fact? A. I do not know how you make that out to be that fact. Q. You say the car coming towards you turned towards you and threw the glare of the light in your eyes? A. It did not quite turn towards me. He was on his right side as though he was going to turn up to Delano. Q. He did turn a little, did he not? A. Not that I noticed. Q. The light struck you in the eyes, did it not, from his car? A. It could not help it when he was coming up the street. Q. Just answer the question. How far away was he when the light struck you in the eyes, in your judgment? A. I guess it would be about

fifty feet away. Q. Did you have a brilliant light on your car? A. A regular Ford light. Q. What kind of lights did this man have? A. That I could not tell. I did not examine his machine. Q. Judging from the way it struck you, was it very brilliant or not? A. They were pretty bright. Q. And this was about fifty feet away, and made as if to turn towards Delano and the light struck you in the eyes and then you ran into the pole immediately afterwards, is that right? A. Yes. Q. Is that right? A. I ran immediately into it after. Q. Yes? A. Why certainly I did. Q. Were you looking ahead all the time? A. I was watching the road at the time. Q. Is not that street lighted up so that you would see that obstruction without any difficulty, running along in the night? A. There was none there that night. Q. In the street anywhere? A. Down further there was. Q. Could you not see that from the headlights on your own car, that obstruction? A. I did not see it. Q. Could you not see it? A. I might have been able to if the lights had been bright on my car. Q. I am not talking about lights bright at all. Could you not see it from the lights on your car? A. Couldn't I see it? Q. Yes, could you not see it from the lights on your own car? A. No, I could not. Q. Do you have two lights on your machine. A. I have. I have five lights on it. Q. Five lights? A. Yes, sir. Q. Pretty good lights too? A. There were two oil lights and three electric. Q. And do you say you cannot see an obstruction a foot through in the street ahead of you with the lights that you had on your car, did you say that? A. I could if there was anything to show it was there. Q. I am not talking about whether there is anything to show it or not, I am talking about that pole that stood there in the street, and you had five lights on your car. Could you not see it if you had been looking? A. Well I was looking but I did not see it. By the court:- Was this pole between you and the other car? A. Between us? Q. Yes. A. No, I was going straight for it." The left side of his car struck the pole.

Again: "Q. Made as if to turn to Delano. You mean by that that he partially turned to go up Eighth Street, do you not? You know what Eighth street is, that street where your accident occurred? A. Yes. Q. That is Eighth. He had turned as if to go up Eighth street? A. He had not turned. Q. He had partially turned? A. He was in the gutter as though he was going to turn. Q. What did you do when the lights of that car struck you in the eyes? A. I just got a hold of my wheel and looked right over trying to watch the street in front of me, and when I did I hit that pole and I went right over the top of the wheel. Q. Did you shut your eyes at all when the glare struck you? A. When the glare struck me? Q. Yes, when that bright light struck you in the eyes. You say it blinded you. Did you shut your eyes then? A. No, sir, I did not. Q. But you could not see? A. I could not see."

The plaintiff concedes that the borough had a right to maintain the traffic pole but insists that it should have been made visible at night by proper illumination at all times, and, that because the pole was not illuminated at the time of the accident, the borough is guilty of negligence and is bound to respond in damages to the plaintiff. We have no doubt about the borough's negligence in the premises but the borough's negligence was not the proximate cause of the accident. The proximate cause of the accident was the inability of the plaintiff to see, because he had been blinded by the lights on an approaching automobile. The two electric lights and the two oil lights on the front of his car were certainly sufficient to enable him to see objects on the public highway, and, but for the temporary blinding of his eyes by the brilliant lights of the approaching car, he could have seen the traffic pole and avoided it.

"In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow

from his act." *Hoag v. Lake Shore and Michigan Southern Railroad Company*, 85 Pa. 293. The wrongdoer in this case was not the borough of Mahanoy City. It was the operator of the approaching car who seems to have failed to dim his lights, and, as a consequence, to have temporarily rendered the plaintiff unable to see. In *Hoffman v. Philadelphia Rapid Transit Company*, 214 Pa., 87, 89, we find the Supreme Court saying: "We have frequently said that negligence is want of care under the circumstances. It does not follow, however, that a jury can be permitted to draw inferences of negligence in the absence of evidence from which such negligence may be reasonably inferred. A jury cannot be permitted to hold the defendant to a higher standard of care than the law requires. It is, therefore, of primary importance in every such case that the plaintiff should establish by affirmative testimony some negligent acts from which a jury can infer want of care. If the evidence does not show, nor tend to show, negligence, there is no question for the jury to determine."

Want of care according to the circumstances means proper precaution. "Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. It is true that what amounts to ordinary care under the circumstances of a case is generally to be determined by a jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence. Such is this case." *P. & R. Railroad Company v. Hummel*, 44 Pa. 375, 379.

It seems very clear that the plaintiff was not able to see the pole not because of the absence of a light upon it,

but because he was blinded and was unable to see anything, and the cause of his blindness cannot in any way be attributed to any neglect of duty on the part of the borough. The non-suit was, therefore, properly entered.

AND NOW, MARCH 21, 1921, the motion to strike off the non-suit is overruled, and the prothonotary is directed enter judgment in favor of the plaintiff upon payment of the jury fee.

Maginnis v. Schlottman.

Constitutional law - Constitution of Pennsylvania - Article XIV, section 5 - Act of July 17, 1919, P. L. 995 - District attorney - Assistant district attorney - Salaries.

An assistant district attorney is not a clerk within the meaning of article XVI, section 5 of the Constitution of Pennsylvania, providing that the amount paid a county officer and his clerks shall not exceed the aggregate amount of fees earned during the term and collected by such officer.

An assistant district attorney is a public officer who performs the same functions as the district attorney. He prepares cases and tries them, comes in contact with the court and performs duties which are not usually performed by a clerk. He requires the same skill and learning as the district attorney, and when trying cases has independent control and direction of matters. He is a public officer and entitled to a full salary as provided in the Act of July 17, 1919, P. L. 995.

Supreme Court. Reversed.

Petition for alternative mandamus. Before BECHTEL, P. J.

The court discharged the petition. The petitioner appealed.

Cyrus M. Palmer and James B. Reilly, for appellant. —An assistant district attorney is a public officer and not a clerk, and under the Act of July 17, 1919, P. L. 995, the petitioner was entitled to his salary at the rate of

\$2,500 per year: *Com. v. Moffit*, 238 Pa. 255; *Com. v. Moore*, 71 Superior Ct. 365; *Northumberland Co. v. Zimmermann*, 75 Pa. 26; Act of May 3, 1850, P. L. 654; Act March 18, 1875, P. L. 25; Act March 31, 1876, P. L. 13; *Heiler v. Muldoon*, 16 Pa. Superior Ct. 553.

Arthur L. Shay and Edmund D. Smith, for appellee, cited: *Com. v. Hamilton*, 74 Pa. Superior Ct. 419, 425; *Dewey* \$2,500 per year: *Com. v. Moffit*, 238 Pa. 255; *Com. vs. Moore*, 266 Pa. 100; *Com. v. Grier*, 152 Pa. 176; *Slattery v. Hender-shot*, 72 Pa. Superior Ct. 240.

TREXLER, J., March 5, 1921:

The case came before the lower court upon the petition of Edward J. Maginnis, the third assistant district attorney of Schuylkill County, praying that a writ of mandamus issue to the county controller commanding him to approve the bill for the salary of the petitioner. He had been regularly appointed the third assistant district attorney on January 5, 1920, by the district attorney of the county, under the Act of July 17, 1919 P. L. 995, the population of said county at that time being more than two hundred thousand and less than seven hundred and fifty thousand inhabitants. The bill he presented was for salary for the month of February at the rate of \$2,500 per annum. The act of 1919, *supra*, provides that in counties having a population of more than two hundred thousand and less than seven hundred and fifty thousand inhabitants, the district attorney shall have authority to appoint a first assistant district attorney at an annual salary of \$3,000, a second assistant district attorney at an annual salary of \$3,000, a third assistant district attorney at an annual salary of \$2,500, and with the approval of the president judge of the court of quarter sessions, may appoint a fourth assistant district attorney at an annual salary not to exceed \$2,000.

Article XIV, section 1, of the Constitution provides, "County officers shall consist of Sheriffs, Coroners, Prothonotaries, Registers of Wills, Records of Deeds, Commissioners, Treasurers, Surveyors, Auditors or Controllers,

Clerks of the Court, District Attorneys and such others as may from time to time be established by law." Article XIV, section 5, provides, "In counties containing over a hundred and fifty thousand inhabitants all county officers shall be paid by salary and the salary of any such officer and his clerks heretofore paid by fees shall not exceed the aggregate amount of fees earned during his term and collected by or for him." The total receipts of the office of district attorney for the month of January, 1920, were not sufficient to pay the salaries of district attorney and his assistants, and the expenses of the office, and the controller refused to pay the warrant because it did not appear that the earnings of the office were sufficient to pay the salaries of what he termed deputy district attorneys and the expenses of the office.

The question therefore for decision is whether an assistant district attorney comes within the terms of section 5, of article XIV, of the Constitution, which limits the salary of the district attorney and his clerks to the fees received. Is the assistant district attorney a "clerk?"

The Act of March 31, 1876, P. L. 13, as stated in its title, was passed to carry into effect the above section of the Constitution, and provides the payment of their fees into the proper county treasury by county officers and a reduction of the salary if the aggregate of the fees does not suffice to pay the amounts fixed for them. The act, however, provides that the assistant district attorney among others shall be paid the full amount allowed to him by the bill, and in another portion of the act, it fixes certain salaries which shall be paid to the assistant district attorneys, the amount being determined by the population of the county. It is evident that the Legislature understood that the language of the Constitution, section 5, article XIV, did not apply to assistant district attorneys, and subsequent legislation emphasizes this view. See Act of May 17, 1901, P. L. 261; Act of April 11, 1903, P. L. 167; Act of July 2, 1895, P. L. 424, and the Act of April 18, 1905, P. L. 206.

We therefore start out with the legislative construction of the section. Our lawmakers did not regard the assistant district attorney as a clerk. The acts which recognize him as an officer have heretofore remained unquestioned. In the face of this practice on the part of the legislature, the court naturally hesitates to pronounce such interpretation erroneous and to invalidate for that reason statutes standing for a long period on the statute book. Where an act has been in operation for a long time without objection on the ground of its alleged unconstitutionality, courts will shrink even more than ordinarily from upholding such an objection to the same: *Com. ex rel. Wolfe v. Butler*, 99 Pa. 535; *Sugar Notch Borough* 182 Pa. 349; *Com. v. Gilligan*, 195 Pa. 504; *Kucker v. Sunlight Oil & G. Co.*, 230 Pa. 528; *Kennedy Township Road*, 50 Pa. Superior Ct. 619.

The word "assistant" is not equivalent to that of "clerk" or "deputy." In common speech the work "clerk" refers to a different class of persons than "assistant." The assistant district attorney performs the same functions as the district attorney. He prepares cases and tries them, comes in contact with the court, and performs duties which are not usually performed by a clerk. He requires the same skill and learning as the district attorney, and when trying cases has independent control and direction of matters. Under the United States statutes, with the same official designation, they are regarded as officers of the court: *In re Leaken*, 137 Fed. Rep. 680. No one would regard a reference to the "clerk" of the district as applying to an assistant. Not being in the employ of the district attorney as a deputy or clerk, and being a public officer, he is entitled to the full salary provided to him. There can be no question of the power of the legislature to create a new office: Constitution, article XII, section 1; *Com. v. Collier*, 213 Pa. 138. It is useless to argue that the construction placed on the Constitution defeats the object of the section. Everyone may have his own ideas as to what the intention of the framers of that instrument intended to accomplish by it, but we are

confined to the words employed, in ascertaining what their purpose was. In this particular case we are not confronted with any ambiguity. We need no rules of interpretation to help us arrive at the meaning of the phrase. The common speech of ordinary man is the only standard we need follow: *Comm. v. Bell*, 145 Pa. 374; *Page v. Allen*, 58 Pa. 338; *Raff v. Phila. et al.*, 256 Pa. 312; *Matten v. Bachman*, C. P. Berks Co., 48 Sept. Term, 1920.

The judgment is reversed, and the lower court is directed to issue the mandamus as prayed for.

PORTER, J., dissents.

Dietrich vs. Pottsville Union Traction Co.

Negligence - Collision between trolley car and automobile.

Where a motorman on a trolley car uses his best judgment and keeps the car under control when approaching an automobile which is being driven in an indifferent manner, without proper effort to get off the track, and a collision occurs the defendant company cannot be held guilty of negligence in an action to recover damages.

Motion to take off nonsuit. No. 146, March Term, 1921.

R. A. Freiler and G. L. Reed, for motion.

O. E. Farquhar, contra.

KOCH, J. July 25, 1921.

About six o'clock in the evening on the 26th. of October, 1920, as plaintiff was operating his Ford one-ton motor truck on Deck Street in the Borough of Schuylkill Haven, he had a head-on collision with one of the defendant's passenger cars, and, as a result, suffered severe personal injuries and his auto-truck was badly damaged. He was alone on his truck. On the street, near to or in the centre of it, is a single track street railway operated by the defendant.

Dietrich was proceeding southwardly on the right side of Dock street and was obliged to turn to the left about forty feet south of Coal street in order to pass a sedan automobile which was standing there on the west or right side of the street. That carried his car over to the left so that the left wheels thereof ran about the centre of the railway track. After passing the sedan car he kept on going with the left wheel of his truck about the centre of the trolley track. The street is paved with brick. When the plaintiff had run three hundred and fifty or four hundred feet, after passing the sedan car, he came within about seventy-five feet of the turn of the street and saw the defendant's trolley car "coming toward him mighty fast," at least, three hundred feet ahead of him. When he saw the trolley car he gave his "truck a little more power and tried to get across the track," but the wheel of his truck slid and he "swung it over to its left," and he "could have got out on that side" but he saw "the car was coming too mighty fast," and he "didn't want to run that risk." "Q. What did you do then?" A. Well, the reason I didn't run out on that side, because I had no business to try and get out on that side, so I swung to the right again and my wheel skidded again and I seen I could not get across the tracks, so I reached down and put on my emergency brake and left my engine running and I gave her enough power so the lights would show bright; and I expected he would slack his trolley, but he never did; did not seem to slack it any at all." The trolley car hit the left side of his truck - "the way it seemed the left sill in front at the fender and at the light." He was immediately rendered unconscious. Speaking of the auto-truck, Dietrich said, "My car was - the wheel was on the track, was here; my wheel was right up against it, and I could not get away from it." At first he described the rail of the track as a "T-rail" and then as "Grooved rail." He said the space between the track and the west curb stone at the place where the accident happened is probably ten feet wide.

After the plaintiff had called the engineer who had made a survey and blue print showing street lines, etc., the blue print was fastened to the wall near to the jury and certain information was obtained from said engineer concerning it. Then the plaintiff took the stand again to identify and mark certain places on the blue print concerning which places he had already testified. He then stated that the distance at which he had first seen the oncoming trolley car was about two hundred and fifty feet or a little further than that away from him. He was then from seventy-five to eighty feet north of Roush Alley and the accident happened ten, twelve or fifteen feet south of the alley, according to his testimony, so that he had gone eighty or ninety or more feet after he saw the trolley car. It was dark when the accident occurred. He tried to get off the tracks as soon as he saw the lights of the trolley car, but he did not try to get off the track before he saw said lights. He has been driving Dock Street for the last twenty-five years and very frequently for the last few years and is well acquainted with it. He had operated this motor truck perhaps twenty-two months. He knew that a trolley left Schuylkill Haven about six P. M. He was looking ahead and saw the motor-man standing on the car platform or sitting in his seat when the car was sixty or eighty feet away from him. He was on the trolley track from the time he passed the sedan car until he struck the trolley car. He said that he was trying to get out of the way and that the car slid and he could not. "It was dry but the tracks are very, rather low at that turn," and his "tires would not run across it." He, "could not get out of the track." He had "Dayton Airless Tires" which "are not altogether solid tire, but the next thing to it." He had solid tires in the rear and inflated tires in the front. The Dayton Airless were in front; they are just like pneumatic." The front wheel skidded, but it would not have skidded if he "had not tried to get across the track." He was three hundred or three hundred and fifty feet from the trolley car when he first tried to turn to the

right in order to get off the track. The second time that he tried to turn to the right the car skidded ten or fifteen feet; then he stopped his car," so he (evidently the motorman of the trolley car) would have a chance to see that there was something in front of it, and he could stop and there would be no collision. That is the reason why I applied my emergency brake." The following appears in the transcript of his testimony: "Q. Why didn't you jump out of your car when you saw you could not get off the track? A. Well, I'll tell you. If I would have knew that he would not stop, I would have had plenty of chance to jump out. Q. I asked you why you did not, why you didn't jump when you saw - A. Well, I expected him to stop till I seen it was too late, and when I seen it was too late, if I would jump out on the left hand side I would have knew I would hardly be able to get away from the car, and if I jump out on the right hand side he would have been liable to throw the truck on top of me. I had very poor chances of jumping at the last minute. At the rate of speed he was coming it didn't take him long to come that distance." His auto car was a left hand driven car. He drove in the middle of the track and did not try to get off of it until he saw the trolley car.

The engineer called by the plaintiff testified that Dock Street extends practically north and south and that its width between curbs varies from twenty-eight to thirty-one feet, although it is 36.78 feet from curb to curb at Coal Street. The railway track is practically in the centre excepting at curves where it is necessarily more on one side than on the other. The distance from Coal Street to Berger Street is 389.71 feet at the curb-stone points. At Berger Street, Dock Street is 31.58 feet wide. Roush Alley is about two hundred and twenty-five feet south of Berger Street, and along there the track is more to the west side of Dock Street on account of the curves but as near the centre as can be. The gauge of the track is four feet eight and one-half inches. At the corner of Roush Alley the distance from the track to the curb on the west side is

thirteen feet and six inches.

Elmer Shollenberger, a witness for the plaintiff testified that he sat on the left side in the rear of the trolley car which left Schuylkill Haven between five-fifty-five and six P. M. He felt the "bump" when the accident occurred and the "jar" raised him from his seat and he went out to see what the trouble was. When moving around a certain curve, which was pointed out to the witness on the blue print, he said the car was going between fifteen and twenty-five miles per hour at that point, but he would not say that it ran faster or slower than usual; it depended on who was running the car and where its last stop was. He testified the brakes were not put on until after the bump, and that the accident occurred at Roush Alley. The trolley car and the auto truck were together when he got off the trolley car. He testified that the car was at a certain telegraph pole when he felt the application of the brakes, and when asked, "About how far from Broadway (a street) was it you felt the brakes applied?" he answered, "I could more answer that, to my knowledge, the feet, than from where the accident occurred, where it was when I got out of the trolley car to where he started to apply, to my judgment, is one hundred feet." The car ran one hundred feet under brakes with a slight application. "They were applied." The auto truck was not upset, the left front wheel was against the track. He heard no alarm sounded. The rear wheels of the auto truck were across the east rail of the track. He places the accident at Roush Alley and he says there is a slight down grade from Broadway to Roush Alley.

The following appears in his examination: "Q. Was there anything there that indicated to you whether or not this motor truck had been pushed any by the trolley car, or couldn't you tell that? A. I could not swear to that, that it was pushed, but to the jar we got, they both was pushed. The car was pushed back and I am pretty sure the trolley car pushed the automobile back too." The trolley car was pushed back first between one and twelve inches.

The motorman had slightly applied his brakes one hundred feet away from the point of collision.

“Q. Then as the trolley car struck the automobile it almost immediately stopped, did it? A. It gave a jar. Q. And stopped. A. And the motorman, operator, applied his brakes. Q. I mean when it struck the car. You said he had slightly applied his brakes about one hundred feet away. A. Yes, sir. Q. When the car struck the automobile did you feel the impact? A. She give a jar and then the motorman applied his brakes. Q. And stopped? A. Yes, sir. Q. Let us go back to the one hundred feet. You said repeatedly that the motorman in running this one hundred feet was applying his brakes? A. Slightly. Q. That is, by applying them you mean he was under control of the car? A. He was applying the brakes slightly to go around the corner, as he generally did. Q. And by the time he reached the intersection of Roush Alley and the street, what speed was he making? A. He did not lose much speed with applying his brakes. Q. But he did reduce the speed somewhat, did he not? A. Sure. Q. Would you tell us how much he reduced it? A. Might have reduced it between, my judgment, between four and seven miles per hour in applying his brakes. Q. You saw him apply the brake in this way? A. No, sir. Q. You did not? A. No, sir. Q. How do you know he was applying it then? A. Through his application of the brake. Q. You felt that? A. Yes, sir. My experience teaches me that. Q. What was that? A. My experience teaches me that, by handling air brakes. Q. You had no experience as a motorman? A. I had experience handling the air brake. Q. Where? A. On the railroad. Q. On a railroad engine, but none on a trolley car? A. No, sir. Q. At any rate, you heard him apply the air brake? A. I heard him and I felt it.” But he did not see the motorman apply the brake. Did not see the motorman at all; did not look at him.

Rev. Edwin H. Smoll, who lives about ninety to one hun-

dred feet north of the place of the accident, saw the auto truck coming about twenty-five feet north of his house and in a few seconds heard the crash of the accident. He indicates Roush Alley as the place of the accident, and he went to the scene at once and found the motor truck in front of the trolley car. He saw automobiles pass trolley cars along there on both sides of the street. Dock street makes a very slight turn between Berger Street and Roush Alley and at Roush Alley is another turn, but that is not very much either.

Emanuel Yeich, a witness for the plaintiff, was around twenty or thirty feet south of Roush Alley and said there is ample room there to pass between the track and the curbstone. Dietrich's knowledge of all conditions, and that a trolley car might be expected to come along there about the time that he got on the track, required him to make way for it by getting off the track in plenty of time, and yet he ran in an indifferent manner about six hundred feet until he saw the lights on the trolley car. He had plenty of room on either side of the track and there is no evidence in the case that any traffic regulations forbade his turning off the track to the left side. There is no evidence that any thing on the left side obstructed or interfered with his turning there. There is no evidence in the case to show that Roush Alley is a stopping place for trolley cars. There is no sufficient evidence to show that the trolley crack, or the paving between the rails, was improperly constructed, or that either was in a neglected state of repair. There is some evidence both by the plaintiff's own admission and by the testimony of one of the physicians, whom he called as a witness, that he may have been under the influence of some alcoholic drink before and at the time of the accident. And from all the evidence, the motorman seems to have been in his place and attentive to his duty. He seems to have applied the brakes of his car when he was one hundred feet away from the place of the accident, and to have had his car under such control as to have stopped

it immediately when he collided with the automobile. So far as his own personal safety was concerned, Dietrich saw the risk before him and remained in his seat to test it. I fail to see where the proofs in this case, or all the fair inferences that may be drawn therefrom, tend to establish any neglect of duty on the part of the defendant.

AND NOW JULY 25, 1921, the motion to strike off the compulsory nonsuit is overruled, and the prothonotary is directed to enter judgment in favor of the defendant upon payment of the jury fee.

Central B. & L. Assn. vs. Moore, et al.

Contending claims for stock in Building & Loan Association - Issue.

When it is shown that there are contending parties for shares of stock in a building and loan association an issue will be directed to determine the rightful owner.

Bill in Equity. No. 5, November Term, 1918.

W. M. Fausset for plaintiff.

George Ellis and J. F. Whalen, for defendant.

KOCH, J. July 25, 1921.

William Moore, a resident of this county, died intestate on the 8th. of October, 1903, leaving to survive him his widow, Hannah, and five children, namely, the said Anna, Bella, Edward, Emma and Albert. No letters of administration were taken out on William Moore's estate at that time. In February, 1906, five shares of capital stock of said association were taken in the name of Emma Moore, but some time subsequent thereto the christian name of Emma was cancelled and the name Anna was written above on the receipt book. Both names appear to have been written by the late Doctor P. K. Filbert of Pottsville, who was secretary of the association and who died over four years ago.

Hannah Moore, the mother of these five children, died intestate December 25, 1914. Before the said five shares of stock matured the building association was notified by Bella, Emma, Albert and Edward not to pay the matured value of said five shares of stock to Anna Moore, claiming they were the property of Hannah Moore, deceased and that they were not the property of Anna Moore. When the shares matured on the 26th of July, 1917, Anna Moore claimed their cash value, to wit, One Thousand dollars, and later brought an action of assumpsit in our court of common pleas in her name against the said association to No. 360 May Term, 1918. Being thus confronted with the rival claimants, the association filed its bill in equity offering to pay the money into court and praying that an order to that effect might be made, and asking for a decree to oblige the rival claimants to interplead together, and, further, for a restraining order by injunction against Anna Moore to prevent her from further prosecuting her suit at law, as well as a restraining order against Bella Griffiths, Edward Moore, Emma Wise and Albert Moore. After said bill was filed, Albert Moore took out letters of administration on the estate of his deceased father, William Moore, and also on the estate of his deceased mother, Hannah Moore, and the bill in equity was then amended so as to add the two estates thus represented as parties defendant. Anna Moore filed her separate, individual answer to the bill of complaint, as well as to the amendments thereto made, and her four brothers and sisters together filed an answer to the original bill. Edward, Emma, Bella and Albert in their joint answer, (and they are all represented by one and the same solicitor) inter alia, say, "These defendants are advised, verily believe and hereby aver that the proceeds of the said shares of stock in the Central Building Association belong either to the estate of Hannah Moore, who died December 25, 1914, or to the estate of William Moore, their deceased father, who died October 8, 1903, or to Emma Moore in whose name the shares were taken." The shares matured on the 26th. of July, 1917

and carried interest from the 1st of August, 1917. We directed the plaintiff to pay into court the sum of one thousand dollars with interest from the 1st of August, 1917, less the costs accrued in this suit up to that time, and further directed a writ of injunction to issue restraining Anna Moore from further prosecuting her suit brought to No. 360 May Term, 1919, and likewise restraining Emma Wise and Albert Moore, as administrator of the estates of his father and mother, from commencing any action at law, and we directed "that the rival claimants of said fund present in open court the evidence under which they respectively expect to support their claim," and a day was fixed for the purpose. At the hearing no sufficient evidence was offered to show that any money belonging to the estate of William Moore, deceased, was at any time paid on the five shares in question, and, therefore, we will regard that estate as not entitled to become a party to any issue in interpleader. The claim of Anna Moore is supported by her own positive testimony and by some corroborating circumstances. She testified that the receipt book should have been made in her name originally; that she provided the money for the first payment and for all subsequent payments, and that the money so paid was her own. Emma Moore was married on the 26th of May, 1906 to a man by name of Wise. She never knew anything about said five shares of stock in the building association until after her mother's death. Mrs. Wise lives at Lykens, Dauphin County, but got to her mother's home in Saint Clair several times a year, whilst the mother was living. It appears that Emma Wise never paid anything either directly or indirectly in the building association.

Mrs. Ann Griffiths, an old woman of about eighty years, testified that she got the saving fund book for these five shares and gave it to Mrs. Moore, whose name she believes was Anna. According to her testimony Mrs. Moore gave her the money to get the book. Mrs. Griffiths procured four books, one for herself, one for her daughter, one for her

son and this one. She testified that she got hers first and then told Mrs. Moore about it and Mrs. Moore gave her the money and told her to get the book, and when she got the book the name of Emma was on it and not either Hannah or Anna. Mrs. Griffiths' recollection appears somewhat indistinct, but she says that Mrs. Moore told her to take out the book in Emma Moore's name and that was the name that was written on the back. Mrs. Griffiths also testified that she paid the saving fund a number of times on this book and that Mrs. Hannah Moore gave her the money to make the payments.

When Albert Moore, who represented both the estates of his father and mother as administrator of each of them, took the stand he testified most positively that he knows that those five shares were taken out for Emma, "for her future;" that his mother had said so, "and that they were actually taken out in Emma's name." Emma was single and was living out but the mother took the shares in her name and in her behalf and told the family so. This positive testimony of Albert Moore, as the representative of the respective estates of his father and mother, ought to exclude him from the controversy, so far as the interpleader proceeding is concerned. No evidence in the case shows any basis for a claim by Bella Griffiths, Edward Moore or Albert Moore, individually. We will, therefore, make Anna Moore and Emma Weiss contending parties to the interpleader issue.

AND NOW JULY 25, 1921, after hearing all the parties and upon due consideration of the premises, it is ordered and decreed that an issue of interpleader be framed by counsel for the respective parties between Anna Moore, as plaintiff and Emma Wise, as defendant, for the determination by a jury in the court of common pleas of the question as to which of these respective claimants is entitled to the fund heretofore ordered to be paid into court in this case, the costs accrued in taking the testimony in this case to follow the verdict in the interpleader issue.

Baker vs. Phila. & Reading C. & I. Co.

Act of June 7, 1907, P. L. 440 - Coal dirt or culm - Equity - Equity Rule 17.

The act of June 7, 1907, P. L. 440 requires the court to determine the question of jurisdiction in an equity proceeding before further action may be taken.

Coal dirt or culm is personal property and a court of equity rarely takes cognizance of the misappropriation of, injuries done to or threatened against personal property, especially where the lack of financial responsibility is not averred.

Equity Rule 17 abolished the combination clause, interrogatories and averment of want of remedy at law, formerly required in a bill in equity.

Bill in equity. No. 1, July Term, 1921.

G. F. Brumm for plaintiff.

J. F. Whalen, for defendant.

KOCH, J. July 25, 1921.

The plaintiff avers that he owns certain large coal or culm banks located upon a number of lots in Donaldson, Frailey Township. Contemplating to take the coal out of said banks for the purpose of marketing the same, on the 14th. of April, 1921, he erected upon said banks a small building to be used as temporary living quarters and a tool house during the progress of his operation. After he had completed said building and was in peaceful possession of occupying the same, he was set upon at about 10:30 o'clock in the night time by a number of armed men who represented themselves as special Philadelphia and Reading Coal and Iron Police, and he was forcibly ejected from the premises, and the said building was demolished and carried away. He avers that the said ejectors entered upon said banks and as an armed guard prevented the complainant's return to the banks, and that by relays of armed men his return to the banks is still being prevented. The plaintiff also avers that the defendant has no warrant or authority for entering upon said banks or for preventing him from oc-

cupying or using the said coal or culm as he sees fit. The prayer of the bill is for an injunction.

The defendant has demurred to the bill, and for causes of demurrer avers as follows:

"1. The bill does not state how Harry Baker became the owner of the culm banks referred to therein or how his title thereto was acquired, or that he owns the ground on which the culm banks are located.

"2. It does not appear from the averments in the bill of complaint that the complainant has not an adequate remedy at law, or that he will sustain irreparable injury. There is no allegation of irreparable injury.

"3. If complaint was forcibly ejected from the premises he has a remedy at law for such forcible ejection.

"4. The bill is not sufficient to warrant the granting of an injunction.

"5. The bill of complaint does not set forth sufficient to warrant equitable relief.

"6. A court of Equity will not interfere by injunction on a bill whose averments are as meager as those in the present bill in equity.

"7. The bill of complaint indicates clearly that an adequate remedy at law exists.

"8. The bill of complaint does not aver that the defendant is not financially responsible."

The demurrer clearly raises the question of jurisdiction in this case in a court of equity and the Act of 7th. June, 1907, P. L. 440, obliges us to decide that question in limine. For, in effect, the demurrer avers "that the suit should have been brought at law," although no averment in the demurrer is couched in those words.

The ownership of the lots upon which the culm is located is not made to appear. The complainant nowhere in his bill of complaint makes any averment of title to the lots in himself; nor does he show by what right he entered upon the lots and erected thereon the building referred to. He fails to name any of the persons who ejected him and de-

molished his building. Nor does he directly say that the defendant company by its officers, agents or employees committed the wrong complained of. He only complains that the men who did the injury represented themselves "as special Philadelphia and Reading Coal and Iron Police." He does not aver that they were or are such police, or that they were or are, acting under and by the direction of the only defendant named in this case, to wit, The Philadelphia and Reading Coal and Iron Company, which in its demurrer avers that it can show it is not the party who did the acts complained of in the Bill of Equity.

The complainant ought to show some right of entry upon the lots described in his bill of complaint. His bill leaves us wholly in the in the dark on that subject. When he presented his bill, together with two injunction affidavits and an injunction bond, and asked us to restrain the defendant "by writ of preliminary injunction until hearing and perpetually thereafter from maintaining the aforesaid guard of special police," we declined so to do, stating verbally our reasons therefor, but we directed a rule to issue to the defendant to show cause why a writ of preliminary injunction should not be issued. The complainant's right to the order prayed for did not appear to be clear to us, and it is only in a clear case that a chancellor should make a restraining order. Minnig's Appeal, 82 Pa. 373. For ought we know the plaintiff may have no right of entry whatever upon the lots in question, and, if he has none, then the owner of the lots may prevent his entry upon the land and may take down and remove therefrom whatever the plaintiff unlawfully erects thereon, if no breach of the peace be committed in such taking down and removal. An owner of land is not obliged to stand silently by and let a stranger enter upon his land to do as he pleases there. It may have been in the exercise of such right that the real owner of the Donaldson lots personally employed special police to do for him what he hesitated or feared to do himself.

Now, if perchance, the plaintiff owns the lots, as well

as the culm banks, and several persons have entered upon and taken and hold possession thereof, under a claim of right and title or otherwise, an action of ejectment offers an adequate remedy at law. Whereas, if they have committed only certain acts of trespass the common pleas offers an ample remedy for that; and the criminal court is not without cognizance in an action in the form of forcible entry and detainer or malicious mischief, to punish those offences.

If this case is intended to try the title to the coal bank, the plaintiff has mistaken his remedy. Coal dirt or culm is personal property; *The Lehigh Valley Coal Company v. Wilkes Barre and Eastern Railroad Company*, 187 Pa. 145, and a court of equity rarely takes cognizance of the misappropriation of, injuries done to, or threatened against personal property, especially where the lack of financial responsibility is not averred. See *Kramer v. Slattery*, 260 Pa. 234 and 13 *Schuylkill Legal Record*, 302. If the plaintiff owns the culm but not the land upon which it is located, and he has no lawful right to enter the land to remove culm, he still has a right to arrange with the owner for permission to enter the land for the purpose of removing the culm, and if the owner should refuse permission upon request made, under proper conditions, such refusal would be evidence of conversion, and an action of trespass (formerly trover) would lie to recover the value of the culm. *Lehigh Valley Coal Company v. Dock*, 62 Pa. 232. Nor does one lose title to personal property just because that property may happen to be located on another's land. *Russell v. Howe*, 30 *Superior Court*, 591.

If parties playing at ball were to bat the ball into another man's garden or grain field, the owner's title to the ball would not be lost thereby, nor would the title to the ball pass to the owner of the garden or the field, and if the owner of the garden or the field arbitrarily refused the owner of the ball permission to recover the ball, or refused to give up the ball, it would be evidence of conversion, and an action would lie to recover the value of the ball. Surely,

the owner of the ball could not obtain an order from a court of equity to restrain the owner of the garden or the field, were the latter owner to threaten to prevent the former owner from entering the garden or the field, without the latter owner's consent.

I consider the second cause of demurrer as futile, because the 17th. Equity rule says, concerning structure of a bill in equity that, "The combination clause, the interrogatories, and the allegation of want of remedy at law and similar averments shall be omitted." Therefore, it was not necessary that the plaintiff allege the want of an adequate remedy at law, or that he will sustain irreparable injury. As in the case of *Kramer v. Slattery*, 260 Pa. 234, the subject matter of the bill in this case relates to culm or coal dirt and not real estate, and it is, therefore, not properly cognizable in a court of equity. Therefore, we shall make an order conformably to the requirements of the Act of 7th June, 1907, P. L. 440 and certify the case over to the common pleas.

AND NOW JULY 25, 1921, it is decided that the suit in this case should have been brought at law, and the case is hereby certified to the law side of the court, at the costs of the plaintiff.

Kapusciensky vs. North Co.

Certiorari - Act July 9, 1901, P. L. 614 - Act 1810, 5 Sm. L. 172 - Shall and may - Act March 21, 1806.

The act of July 9, 1901, P. L. 614 requires a constable to serve a summons upon a corporation by handing a true and attested copy thereof at any of its offices, depots or places of business, to its agents or persons for the time being in charge thereof. If upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed and the return must conform thereto. The act of 1810, 5 Sm. L. 172 requires that the court shall, at the term to which the proceedings of the justice of the peace are returnable in pursuance of writs of certiorari determine and decide thereon; such requirement is merely directory and not mandatory; the word "shall" means "may."

The act of March 21, 1806 provides that where a duty is enjoined or anything directed to be done by any act of assembly directions of the act shall be strictly pursued and in such instance the word "shall" means "must."

Certiorari. No. 283, November Term, 1920.

J. O. Ulrich, for plaintiff.

Roads & Roads, for defendant.

KOCH, J. March 21, 1921.

Four reasons are assigned in support of the rule. They are as follows:-

"1. The record does not show service of the certiorari upon the justice within five days after it was issued.

"2. The exceptions filed by the plaintiff in error are not specific.

"3. The exceptions do not state whether service could have been made as set forth in the exceptions.

"4. The plaintiff in error failed to have the matter raised by the exceptions determined by the court at the November term as required by Section 25 of the Act of 1810, 5 Sm. L. 172."

The original writ is dated 25th. October, 1920 and on its face, immediately below the signature of the prothonotary, shows the written acceptance by Squire Heffner next day. Hence, the first reason fails.

Only one exception was filed by the plaintiff in error, reading as follows:-

"1. The said record shows that summons was 'served on defendant by Constable Hogan Oct. 1st, 1920, by handing a true and attested copy thereof to L. C. Clouser in charge of the defendant's place of business at Pottsville, Sch. Co., Pa." The said service is defective for the reason that it was not made in accordance with the requirements of Section 1 "Second (e)" of an Act approved July 9, 1901, P. L., 614, relating to the service of certain process in actions at law, etc."

The exception is specific and the second reason must fail.

A comparison of the language in which the return of the service of the summons is put when compared with the language in Section 1, Sub-division "Second" (e) of the act referred to will show whether "the said service is defective for the reason that it was not made in accordance with the requirements of" the said act. The exception might be more specific if it pointed out the particular requirements in which the service is defective. But, nevertheless, it cannot be said that the exception is not specific.

Nor is the third exception of any avail to the defendant in error.

The justice of the peace certified his transcript on the 30th. of October, 1920 and it was filed in court on November 4th, 1920. The defendant's exception was filed on the 29th. of November, 1920. The 25th. section of the Act of 1810, 5 Sm. L. 172, inter alia, provides that, "***** the court shall, at the term to which the proceedings of justices of the peace are returnable in pursuance of writs or certiorari determine and decide thereon." Plac. 78, 2 Purd., 1451. Under Rule thirteen the defendant in error could have entered a rule of course upon the plaintiff in error to file his exceptions earlier than they were filed. But they were filed, nevertheless, in time to dispose of the case at the November Term of court, and it lay within the power of the defendant in error, as well as the plaintiff in error,

to call the matter up for disposition by the court. In fact the defendant in error had a greater interest in the earliest disposition of the case. It is not the duty of the court to keep track of the record and to see to it that proceedings are disposed of at the earliest possible date. It is counsel's duty to take the necessary steps to get a case into the court's hands. Therefore, the word "shall" in the act of 1910 is merely directory and not mandatory. "The word 'shall' when used by the legislature to the court is usually a grant of authority and means 'may' ;" *Becker v. Lebanon Street Railway Company*, 188 Pa. 484, 496. "The word 'shall' may be held to the merely directory when no advantage is lost, when no right is destroyed, or when no benefit is sacrificed, either to the property or the individual by giving it that construction; but, if any right to any one depends upon giving the word the imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to any one depends upon the imperative use of the word it may be held to be directory merely." 7 Words and Phrases, 6463.

For the foregoing reasons the rule must be discharged, but, at the time of the argument, counsel on both sides argued the exceptions of the plaintiff in error so fully as to warrant our disposition of it at this time. The Act of July 9, 1901, P. L. 614, relates to the service of certain process in actions at law. The first section provides how the writ or summons is to be served by the sheriff and paragraph (e) in sub-division second shows how the writ shall be served upon a corporation, a partnership limited, or a joint stock company, to wit:- "(e) By handing a true and attested copy thereof, at any of its offices, depots or places of business, to its agents or person for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed." The sixteenth section of the said act, inter alia, provides, that, "Writs issued by any

magistrate, justice of the peace or alderman shall be served in the county wherein they are issued, by the constable or other officer therein to whom given for service, in the same manner and with like effect as similar writs are served by the sheriff when directed to him by the proper court." The return of service by the constable endorsed on the summons in this case is as follows:- "Served the within writ Oct. 1, 1920, upon within named F. A. North Co. in Pottsville at the place of business by handing a true and attested copy thereof to L. G. Clouser, salesman in charge of business." The return does not show that the constable made inquiry at the office to ascertain the residence of one of the officers and that having made such inquiry an attempt to serve at the residence failed from some cause. Service can only be made at any of the defendant's offices, depots or places of business by handing a true and attested copy of the summons to the defendant's agents or person for the time being in charge of such office, depot or place of business, if upon inquiry at such office, depot or place of business the residence of an officer within the county is not ascertained, or, if after such ascertainment, service at the residence failed from any cause. So far as the service in this case is concerned no one can say that such inquiry was made or that any attempt was made to serve an officer at his residence within the county. Without proper service the justice of the peace was without power to proceed with the hearing in the absence of the defendant or its representative. Act 21st. of March, 1806 provides that where a duty is enjoined or anything directed to be done by any Act of Assembly directions of the act shall be strictly pursued and in such instance the word "shall" means "must." Election Cases, 65 Pa. 20, 41. It was, therefore, necessary to make service and the return thereof strictly in accordance with the provisions of the act of 1901. *White v. Heyl & Patterson*, 15 D. R. 634; *Haynes v. New York Central & Hudson River Railroad Company* 15 D. R. 970; *Hoefling v. Pelican Mutual Life Insurance Company*, 23 D. R. 117.

AND NOW MARCH 21, 1921, the rule is discharged, the exception is sustained, the judgment is reversed and the proceedings are set aside.

Cleary vs. Guzzinsky

Landlord and tenant - Holding over - Lease for definite period.

When a landlord suffers his tenant to remain in possession after the expiration of a tenancy and receives rent from him a new tenancy from year to year is established and, in the absence of a new agreement, the tenant hold the premises subject to all the covenants in the original lease.

When a lease is for a definite period and the tenant holds over, the landlord may treat him as a tenant by sufferance and turn him out without three months notice, previous to the end of the period.

Affidavit of law. No. 463, September Term, 1920.

M. J. Ryan, for plaintiff.

J. H. Garrahan, for defendant.

KOCH, J. May 2, 1921.

Pursuant to the terms of a written lease made the first day of April, 1914, Guzzinsky took possession of a certain store room and dwelling house situate in the borough of Mahanoy City and belonging to the plaintiff. The lease was for a term of one year from the first of April, 1914 to the first of April, 1915. It contains the following covenant:

"The said lessee shall give ninety days notice previous to the expiration of the said term of his intention to remove, and ninety days notice previous to the expiration of said term, being given by him to quit the premises, he shall, at the expiration thereof, deliver unto the said lessor, or his assigns, peaceable possession of the same, in the same good order and condition as when he took possession thereof, common wear and unavoidable accident by fire excepted.

In default of notice aforesaid, this agreement shall be considered as renewed for the succeeding term of one year."

Guzzinsky remained in possession of the property until on or about the 24th. of August 1920, when he vacated the premises and "took and removed therefrom shelving used as a part of the said premises and as fixtures thereto and which belonged to the plaintiff and were part and parcel of the demised premises at the time of the demise," according to the plaintiff's statement which was filed in this case. The plaintiff further avers in his statement "that the said shelving was installed by the plaintiff and owned by the plaintiff and that its value, in place, was One Hundred and forty-eight dollars, for which he now sues.

The question of law raised by the affidavit of defense is that the above quoted covenant from the lease "was not operative at the time of the alleged taking of the personal property, to recover the value of which this suit is brought," and, therefore, that there is no breach of an express covenant in this case. The defendant states the question thus: "The plaintiff cannot recover in the suit at bar for the reason that the statement of claim does not set forth an express contract between plaintiff and the defendant to pay the alleged value of said personal property therein mentioned, and it does not set forth any facts, conditions or circumstances from which a contract could be implied in law."

"When a landlord suffers his tenant to remain in possession after the expiration of a tenancy and receives rent from him, a new tenancy from year to year is established. And if no new agreement be entered into, the law will presume, in the silence of the parties, that the tenant holds the premises subject to all such covenants contained in the original lease as apply to his present situation." *Phillips v. Monges*, 4 Wharton, 226, 229.

In *Diller v. Roberts*, 13 S. & R., 60, the syllabus says, "Generally speaking, where a tenant holds over after the first year, the law implies an agreement by him to pay the

same rent, and at the same time, which he agreed to the first year. But if the lease for the first year contains many collateral matters, on each side to be performed, that can only be performed in the first year, it does not follow, that the law implies an extension of it to the second year."

In *Hemphill v. Flynn* 2 Pa. 145, we read, "The decisions are, that where a lease is for a definite period, and the tenant holds over, the landlord may treat him as a tenant by sufferance, and turn him out without three months notice, previous to the end of the period. But it is a different question, whether, in case the tenant holds over, in such case, the landlord has not the option to treat him as tenant for another year, under the same terms as the former lease so far as applicable. There seems to be both reason and authority to show that he may." And we further read that "**** when a landlord suffers a tenant to remain in possession after the expiration of the tenancy, and receives rent from him, a new tenancy from year to year is established: and if no new agreement is entered into, the law will presume a new agreement is entered into, in the silence of the parties; that the tenant holds the premises subject to all such covenants contained in the original lease as apply to his present situation."

In *Hollis vs. Burns*, 100 Pa. 206, 209, the court said, "If the lessee enters as a tenant by the year and holds over, it is optional with the landlord, either to treat him as a tenant from year to year, or as a trespasser; *Hemphill v. Flynn*, 2 Barr. 144." And the court goes on to say further, "When, however, we are dealing with the question of an implied renewal of a tenancy, all the terms of the former lease must be considered. The purpose is not to make a new lease essentially different; but to continue the former so far as its terms may be applicable. In its very nature the implied renewal of a lease assumes the continuation of its characteristic features. Hence, if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that

was a tenancy by the month it will presumptively so continue. The landlord cannot impose a longer term; nor one radically different from the former." See also *Laguerenne v. Dougherty*, 35 Pa. 45.

Where a tenant holds over he holds subject to all the covenants of his lease so far as they are applicable. Covenants that are not applicable cease to exist under the continued tenancy. *Pollman v. Morgester*, 99 Pa. 611.

In the case before us the defendant held over under all the covenants of his lease, one of which covenants bound him to surrender possession of the premises "in the same good order and condition as when he took possession," and, if he failed therein, it was in violation of an express covenant in the lease, under which he is liable in an action of assumpsit, because an action of covenant no longer lies. See section 1, Act 25th May, 1887, P. L. 271. The lease describes the property leased as "A certain store room and dwelling house," and the shelving which was removed therefrom by the tenant is alleged to have been "used as a part of the said premises and as fixtures thereto." Therefore, the removal of the shelving was in direct violation of an express covenant in the lease, and the suit here is based upon a breach of that covenant to recover the damage done to the store room by the removal of the shelving, which, in place, is alleged to have been of the value of One hundred and forty-eight dollars. In her statement the plaintiff avers, "That the total value of said shelving and moulding and the necessary labor to erect and install the same amounts to One hundred and forty-eight (\$148.00) dollars." This is but a mode of clearly expressing the damages sustained by the plaintiff through the defendant's breach of his express covenant, because he did not leave the property in the same order and condition as when he took possession thereof. The plaintiff's statement is most explicit as to the covenant and the exact breach thereof with the resulting damages, and the defendant should make answer to the facts, if he can

make answer thereto.

AND NOW MAY 2, 1921 the question of law raised is decided against the defendant, and he may file a supplemental affidavit of defence to the averments of fact in the statement within fifteen days.

Stabinsky vs. King

Practice act 1915, section 9 - Practice as to defective statements.

A statement of claim which does not allege whether the contract sued upon was oral or in writing does not conform to the practice act of 1915 and the defendant should move to strike it from the record instead of setting up such defect in an affidavit of defense.

Affidavit of defense. No. 166, January Term, 1921.

A. D. Knittle for plaintiff.

E. D. Smith for defendant.

KOCH, J. March 21, 1921.

On the 15th. of November, 1915 Julian Zelasko by written articles of agreement leased a hotel in Minersville to Constance Stabinsky for a period of five years. Zelasko alone signed the agreement. Six days after leasing the property Zelasko died, and Johanna Zelasko King became the executrix of his last will and testament. Constance Stabinsky died on the 14th day of October, 1918 and the plaintiff's statement of claim says:-

"6. That after the death of Constance Stabinsky, by agreement with Johanna Zelasko King the executrix of the estate of Julian Zelasko, the license formerly held by Constance Stabinsky was transferred to Eva Stabinsky who held the license and premises under the same terms of the agreement as Julian Zelasko and Constance Stabinsky and made part hereof and numbered exhibit one."

Under terms of the agreement Stabinsky paid Zelasko \$1800 for certain liquors and in consideration of the transfer of the license together with the good-will of Zelasko. We find this stipulation in the agreement:-

"At the end of the said term of five years named in the above lease the party of the second part hereby agrees to transfer, assign and deliver unto the party of the first part said license, good will, etc., upon the payment by the said party of the first part of Fifteen hundred (\$1500.00) dollars, unto the said party of the second part."

This present suit is brought to recover said Fifteen hundred dollars.

The affidavit of defence raising a question of demurrer sets down four causes to wit:-

"1st. That the plaintiff's statement does not state whether the contract in suit was oral or in writing.

"2nd. That the plaintiff's statement does not disclose a right of action in the plaintiff.

"3rd. That the contract as alleged is impossible of performance.

"4th. The performance of the alleged contract is unlawful and against public policy."

The first matter set down is not a cause for demurrer.

The ninth section of the "Practice Act nineteen fifteen," P. L., 484, inter alia, provides that, "The statement of claim shall be as brief as the nature of the case will admit. In actions on contracts it shall state whether the contract was oral or in writing." If the pleading does not conform to the provisions of the said act, the court upon motion may strike from the record such pleading and may allow an amendment or new pleading to be filed upon such terms as it may direct. Section 21st. The first question, therefore, is not a question of law to be raised as if by demurrer; it is a question of practice and should have been the first step to be taken by the defendant. If the agreement under which Eva Stabinsky had the license transferred to herself is in writing such fact should be made known in the plaintiff's state-

ment of claim and a copy of the agreement should be attached thereto. But if the contract be oral, then the oral contract should be set forth as fully as may be in the plaintiff's statement of claim. The question of law raised by the affidavit of defence must await the determination of a proper motion to strike off the statement made in accordance with the provisions of the 21st section of the "Practice Act nineteen fifteen." It should also be made known in the statement of claim by what authority the executrix of the estate of Julian Zelasko made the alleged agreement with Eva Stabinsky, in as much as upon Julian Zelasko's death, had he died intestate, the hotel would have passed to his heirs and not to the executrix of his last will and testament. The authority of the executrix to make the alleged agreement with Eva Stabinsky should be made to appear in the statement of claim. If after all things have been done that should be done according to good practice and the real question of law intended to be raised at this stage of the case, be again raised, it can then be properly disposed of. Therefore, we will overrule the present so called affidavit of defence raising statutory demurrer without deciding, for the present, the real question intended to be raised by it.

AND NOW MARCH 21, 1921, the question of law raised by the affidavit of defence is decided against the defendant without prejudice to raise the same question after the first so called cause of demurrer has been properly brought before the court and disposed of.

Mar Lin Water Co. vs. Lehigh Valley Coal Co.

Rules of Court - Injunction - Proceeding for condemnation.

Rules of court have the binding force and effect of a statute and are to be complied with.

Where a condemnation proceeding has been restrained by injunction further action upon the same subject must wait until the equity proceeding is fully ended.

Rule to amend. No. 247, March Term, 1921.

G. F. Brumm, for rule.

D. W. Kaercher, contra.

KOCH, J. April 25, 1921.

The basis of this rule is an order of court filed March 7, 1921, which, without the caption, reads in full as follows:-

"Now March 7, 1921, upon motion of Geo. F. Brumm atty. for plff., the court grant a rule to show cause why an amended bond and an amended petition should not be filed in the above case. Returnable March 21, 1921. By the court." The order was made against defendant's objection.

The defendant filed its answer to the rule and therein states numerous objections to it. Those objections may be resolved and briefly stated thus:-

(a). The rule was not obtained in the manner provided by our rules of court;

(b). The Mar Lin Water Company is not authorized to condemn or appropriate the defendant's land;

(c). The Mar Lin Water Company is now subject to a restraining order of this court sitting in equity issued to No. 3 March Term, 1921, enjoining plaintiff from condemning the lands of the defendant, and

(d). The amount of the bond is grossly inadequate.

"In all cases not on trial in which it is sought to amend the record, a petition shall be presented to the court by the party seeking such amendment setting forth at length or in detail the amendment so desired, a copy of which pe-

tition and rule shall be served upon the opposing party, or his counsel of record, at least five days before the return day of the rule." Rule 3. "All motions must be in writing and, when based upon matters or facts appearing upon the face of the record, such matters and facts must be specified and set out in such motion." Rule 32, paragraph 3.

Rules of court have the binding force and effect of a statute and are to be complied with. Act 16th June, 1836, section 21, P. L. 792; 1 Purd. 636, plac. 92; 2 Pepper & Lewis Dig. of Dec., Column 3123.

We need not consider the second list of objections to this rule, as the same have been resolved and stated by us above in (b). Nor need we now consider the reason indicated in (d). That indicated in (c) should not pass unnoticed. The plaintiff started this condemnation proceeding last February, and an order restraining it by an injunction issued out of the said court sitting in Equity to No. 3 of March Term, 1921. The injunction is still in force, awaiting the court's final disposition after full hearing had upon bill, answer and replication. The proceeding as begun is an attempt to condemn and appropriate 239.35 acres of the defendant's land in this county. The injunction arrested the proceeding and it should remain unaltered until the injunction has been dissolved. The plaintiff's present rule is intended to allow it to file an amended petition to condemn only the surface of said 239.35 acres. If the plaintiff desires to so amend its record as to condemn only the surface instead of the entire estate of the defendant, it should wait until its path is made clear by the dissolution of the pending injunction, after which, if that happens, it may take such steps as it deems necessary to effectuate its present intention.

AND NOW APRIL 25, 1921, the rule is discharged without prejudice however against the plaintiff taking such steps as it may deem necessary to amend its proceedings, when and if the injunction in the equity case now pending be dissolved.

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ATTORNEYS AT LAW

An assistant district attorney in charge of a grand jury may add the name of a witness on an indictment, and summon him before that body. The mere fact that he did not make sure the witness would give testimony harmful to defendant, does not justify a conclusion that he acted with an improper motive; and this is especially the case where there is nothing in the evidence to show that the officer acted from any evil or corrupt purpose.

An assistant district attorney will not be disbarred because he took into the grand jury sworn notes of testimony in another case, to check up the testmony to be taken where it appears that he believed defendant to be innocent, and possibly desired the bill to be ignored, but there is nothing to show that he was moved by a corrupt purpose.

In disbarment proceedings, where there are several charges against the attorney, in the office of assistant district attorney, and the accused files an answer in which he avers that he did not misbehave himself, such an answer does not throw open to investigation everything that he may have done during the occupation of his office.

Lawyers cannot be disbarred for breach of good taste, and while they may be disciplined for ethical mistakes, absolute disbarment in such cases can seldom be justified, and this is particularly so where the matter in question is not contained in the written charges assigned as reasons for disbarment.

A court may, of its own motion, institute proceedings for disbarment.

The court may, in such proceedings, call and examine an attorney, subject to his right of declining to answer any question which may incriminate him.

In disbarment proceedings against an assistant district attorney, the accused is entitled to the benefit of the rule that a public official, in the conduct of his office, is presumed to have been actuated in every instance, by proper motives, until the contrary is shown.

Duty of district attorney in proceedings before grand jury defined and explained.

Where an order disbaring an attorney is reversed on appeal, the costs will be imposed upon the county.

Maginnis's Case 216

An attorney-at-law may be disbarred where it appears that he retained and used money which he had collected for a client, and refused to return it when demand was made upon him. The fact that the money was paid back before the rule for disbarment was acted upon, does not wipe out the offense.

The fact that a rule for disbarment is allowed to rest for five years, and the attorney suffered to continue his practice, is not ground for reversing the final action of the court in making the rule absolute.

The statute of limitations has no application to such a case, nor does the delay amount to laches.

An attorney-at-law, who, in a public address, incites popular feeling against the judges for the purpose of interfering with a

fair and impartial consideration of a pending case, may be disbarred.

An improper attempt to influence judicial action is never privileged.

An attorney is an officer of the court, and when his conduct is in question, it is proper for a judge to interrogate witnesses.

The matter of continuance is for the discretion of the trial court, and its refusal is not cause for reversal.

The court has the undoubted right, in the exercise of a sound discretion, to disbar an attorney for serious misconduct in court or out of court, and such right should be firmly exercised, but with great caution and only in a clear case.

The court has discretionary power to reinstate an attorney after disbarment.

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ASSESSMENTS

The law governing assessments of land for the purposes of taxation is statutory and neither the assessor, county commissioners, board of revision nor the courts, have authority to proceed in any other manner than as prescribed by the statutes.

The act of July 27, 1842, P. L. 445 prescribes the assessor's oath.

The assessor actually makes the assessment which continues until modified on appeal.

The assessor may not divide a tract of land in several parts but must value each tract as a whole.

All real estate should be assessed at its actual market value, at a uniform standard of value throughout the county.

The actual market value of land means that price at which it would sell, to a bona fide bidder, at a public sale, after full public notice. The act of April 19, 1889, P. L. 37 does not authorize one appeal for all the lands in one township, but a separate appeal must be filed for each assessment whereby one is aggrieved.

The acts of April 3, 1804, Sec. 1 4 Sm. L. 201 and March 28, 1906, Sec. 1. 4 Sm. L. 346 require the holders of unseated lands to furnish the county commissioners a statement containing a description of each and every tract so held, the name of the persons to whom the original title from the commonwealth passed, the nature, number and date of such original title.

If a tract of unseated land is divided by township lines each part thereof should be valued and assessed upon the acreage in the respective townships.

When the market value of land has been ascertained it becomes the duty of the court, on appeal, to fix the market value so that the ratio between its market and assessed value shall be the same as the ratio existing between the market and assessed values of all the real estate throughout the county.

When the appellee offers in evidence the assessment made by the board of revision and rests, a prima facie case is made out in favor of the assessment and the burden is upon the appellant to overcome it by the weight of evidence; if not overcome and it is not shown that the county commissioners, sitting as a board of revision, acted arbitrarily, or without sufficient reliable information and evidence in making the assessment, it will not be reduced by the court.

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AUDITORS

Where auditors find a sum stated due by a collector of taxes of a school district, and, on appeal from this finding, judgment is entered against him, from which judgment no appeal is taken, and an action on his bond is brought more than six months after the judgment was entered, such judgment is conclusive of the liability of the sureties on the bond.

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BENEFICIAL ASSOCIATIONS

Where an action is brought against a beneficial association to collect a funeral benefit the defendant cannot set up as a defense that the deceased was in arrears in his dues or assessments when he was entitled to a sum for allowance for a disability in excess of such dues or assessments.

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CERTIORARI

The act of July 9, 1901, P. L. 614 requires a constable to serve a summons upon a corporation by handing a true and attested copy thereof at any of its offices, depots or places of business, to its agents or persons for the time being in charge thereof. If upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed and the return must conform thereto. The act of 1810, 5 Sm. L. 172 requires that the court shall, at the term to which the proceedings of the justice of the peace are returnable in pursuance of writs of certiorari determine and decide thereon; such requirement is merely directory and not mandatory; the word "shall" means "may."

The act of March 21, 1806 provides that where a duty is enjoined or anything directed to be done by any act of assembly directions of the act shall be strictly pursued and in such instance the word "shall" means "must."

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CHURCHES

1. Under section 7 of the Act of April 26, 1855, P. L. 323, 330, and its amendments, the trustees of a church property hold but the legal title thereto the entire beneficial interest being in the congregation.

2. All the lay members of a church are entitled to vote upon questions relating to the control and disposition of the church property.

3. Nonpayment of dues will not deprive lay members of this right; so long as membership continues, the right likewise continues.

4. Not decided, whether, since the church property was purchased before the passage of the Act of May 20, 1913, P. L. 242, the "control and disposition of the lay members" must be "exercised in accordance with and subject to the rules, regulations, usages, canons, discipline and requirements" of the religious denomination with which the church is connected.

5. This court will not consider defects which might have been amended in the court below, had they been called to its attention.

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CONSTITUTIONAL LAW

An assistant district attorney is not a clerk within the meaning of article XVI, section 5 of the Constitution of Pennsylvania, providing that the amount paid a county officer and his clerks shall not exceed the aggregate amount of fees earned during the term and collected by such officer.

An assistant district attorney is a public officer who performs the same functions as the district attorney. He prepares cases and tries them, comes in contact with the court and performs duties which are not usually performed by a clerk. He requires the same skill and learning as the district attorney, and when trying cases has independent control and direction of matters. He is a public officer and entitled to a full salary as provided in the Act of July 17, 1919, P. L. 995.

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Where an account mingles principal, income, personal property and real estate confirmation will be refused.

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A properly stated account should in the first instance contain the principal debit items, followed immediately by the discharges claimed, and if another account is embraced within the paper, it should be separately stated in a like manner. Any other method of stating accounts should not be approved. Mingling of administration and distribution in an account is in violation of our well-established practice.

The filing of an account by a fiduciary is in the nature of a petition to a court of record alleging matters of fact; its ultimate purpose being to secure the approval of the court of its contents by setting out in detail the acts of the fiduciary performed in his official capacity; and the court should not receive or consider the account unless the same is duly verified.

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When a defendant in a desertion case gives a recognizance, with surety to comply with the order of the court and, after default by the defendant, the surety pays a sum equal to the amount stated in the recognizance, the right of further collection is exhausted and the surety relieved.

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DIVORCE

The act of June 25, 1895, P. L. 309 gives a husband the right to obtain a divorce where the wife, by cruel and barbarous treatment, or indignities to his person, rendered his condition intolerable and life burdensome, but the husband must prove that the conduct of his wife rendered his condition intolerable and life burdensome as the result of her cruel and barbarous treatment and the evidence must show such a course of conduct.

The master must make specific findings of fact respecting the establishment of the cause of divorce which is alleged in the libel; that the libellant has had a residence in the county for a length of

time sufficient to give the court jurisdiction, he must satisfy himself, by personal inquiry of the fact of residence and report to the court that the residence as stated in the libel is bona fide and correct as well as the time during which such residence continued.

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A decree pro confesso cannot be made upon a libel in divorce. Rule 17 requires the master in divorce to examine the witnesses upon all matters which appear relevant and material.

The court, in the exercise of its discretionary power may permit the respondent to file an answer nunc pro tunc, before the report of the master is filed.

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EQUITY

When a case in equity presents a controversy over a title at law a court in equity should not assume jurisdiction until such title has been established at law, unless there be a strong and mischievous case or pressing necessity which entitles the party to call to his aid such jurisdiction.

The case should be certified into the law side under the act of June 7, 1907, P. L. 440 to determine the legal question.

Cosgrove vs. Darkwater Coal Co. 24

The act of June 7, 1907, P. L. 440 provides that where a bill in equity has been filed and the jurisdiction is questioned such question must be determined by the court before merits are inquired into and if the court is of the opinion that a question of law exists the case must be certified into the law side.

Where a legal right is asserted it must be established at law before a court in equity will assume jurisdiction, unless there is a strong and mischievous case or pressing necessity which entitles the plaintiff to relief.

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On a bill in equity for an injunction to restrain the unlawful diversion of water from one stream, and its discharge into another stream in a different watershed, and the consequent damage to the plaintiff's property, it is error not to grant such injunction.

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The act of June 7, 1907, P. L. 440 requires the court to determine the question of jurisdiction in an equity proceeding before further action may be taken.

Coal dirt or culm is personal property and a court of equity rarely takes cognizance of the misappropriation of, injuries done to or threatened against personal property, especially where the lack of financial responsibility is not averred.

Equity Rule 17 abolished the combination clause, interrogatories and averment of want of remedy at law, formerly required in a bill in equity.

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EJECTMENT

The Act of March 14, 1872, P. L. 25 relating to ejectments is still in force notwithstanding the Acts of May 8, 1901, P. L. 142, June 7, 1915, P. L. 886 and June 12, 1919, P. L. 478.

A final judgment, between the same parties or their privies, on the same subject matter, though in a different form of action is conclusive and bars any further action between them.

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ELECTIONS

An appeal to the Supreme Court, from a judgment quashing a petition for a mandamus will be dismissed when the question raised is merely academic and a decision on the merits would be without effect; moot questions or abstract principles of law will not be decided.

The act of June 10, 1893, P. L. 424 does not apply to nominations made by a body of citizens acting as a political party which has not complied with the provisions of the act.

Brown vs. Leib 72

EXECUTORS

It is the duty of an executor who is given power to sell real estate to proceed to make sale of the same when the time has arrived for the power to be exercised and, ordinarily, no application to the court is necessary and if such application is made, the order should be refused unless there are special circumstances which would warrant the court in intervening.

Estate of Charles D. Kaier 32

Where an executor is given the power of sale, and a sale is necessary to carry out the provisions of the will, and the executor has sold, the court will not interfere with the action of the executor when no improper conduct on the part of the executor has been shown, notwithstanding the legatees under the will executed an agreement of sale, which antedated the action of the executor in making sale.

When a power of sale is given to an executor, and a sale is necessary to carry out the provisions of a trust imposed by the will, the executor is obligated by the directions as to the trust, and it is his duty to sell.

Estate of E. J. Fry 76

FOREIGN CORPORATION

Where a foreign corporation is sued by summons served upon the Secretary of the Commonwealth as its lawful attorney and a judgment entered in due course such judgment will not be opened upon petition alleging want of knowledge of the action but failing to set up any defense.

Bittenbender vs. Wolf Creek Coal Co. 353

ISSUE

When it is shown that there are contending parties for shares of stock in a building and loan association an issue will be directed to determine the rightful owner.

Central B. & L. Assn. vs. Moore 395

JUDGMENT

A decree of distribution in the orphans' court is as solemn and binding as judgment in any other court of record.

The procedure to open judgments is well established by law and long practice and must be followed.

Estate of Catharine Hildenbrand 56

LATERAL SUPPORT

In the absence of malice, wantonness or negligence the right to equitable interference as to lateral support is restricted to the land in its natural condition and such right cannot be enlarged.

Equity will not interfere where the injury can be compensated in damages, nor where the effect of the act or threatened act is speculative, uncertain or problematical, nor where greater injury will be done by enjoining than by leaving the party to his redress at law.

Home Brewing Co. vs. Thomas Colliery Co. 163

LANDLORD AND TENANT

When a landlord suffers his tenant to remain in possession after the expiration of a tenancy and receives rent from him a new tenancy from year to year is established and, in the absence of a new agreement, the tenant holds the premises subject to all the covenants in the original lease.

When a lease is for a definite period and the tenant holds over, the landlord may treat him as a tenant by sufferance and turn him out without three months notice, previous to the end of the period.

Cleary vs. Guzzinsky 408

MINES AND MINING

The owner or operator of a coal mine may deposit refuse upon his own land; if it is carried into a stream by extraordinary flood and spread over other land the operator is not responsible in damages to the lower owner, but if such refuse is deposited on land of the operator from which it is washed into the stream by ordinary storms or if he deposits such refuse directly in the stream, the operator is liable for damages sustained by such negligence.

The deposit of such refuse and resulting damage is a private nuisance and the proper remedy is an action for trespass.

McGonigle vs. Saint Clair Coal Co. 106

An owner of land abutting on a highway may use the land for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage that may be derived therefrom.

An abutting owner owning coal under a public highway has the right to mine and remove it, but the removal must be done in such manner as not to injure the surface of the highway, or create a condition whereby injury may follow later.

A coal company acquired no right to interfere with the surface of a public highway for the purpose of mining coal, under an agreement with the highway supervisors or their attorney that another road should be provided by the company, inasmuch as an encroachment or obstruction was a nuisance per se which could not be legalized unless the highway was vacated in the manner provided by law; nor can laches be imputed to the Commonwealth under the circumstances of the case; and occupancy of the property inconsistent with the public rights, is a public nuisance; and no length of time will legalize a public nuisance.

A public highway is the property of the people of the State and the public rights cannot be lost by nonuser or by municipal action not expressly authorized by law.

Where a coal company has wrongfully mined under a public high-

way, the supervisors as municipal authorities are the proper officers to ask for a compulsory mandate to redress the injury.

Breisch vs. Locust Mountain Coal Co. 47

MUNICIPALITIES

The act of March 31, 1860, P. L. 400 makes it unlawful for any manager or agent of a municipality to be interested in any municipal contract.

The act of May 28, 1907, P. L. 262 prohibits borough officers, agents and employes from being interested in any contract for the sale or furnishing supplies to the borough and provides for forfeiture of office or appointment.

The act of May 8, 1919, P. L. 137 validates defective ordinances for paving.

Borough of McAdoo vs. Dailey 126

The Act of July 26, 1913, P. L. 1374 (Public Service Company Law) and the Act of June 1, 1915, P. L. 685, giving to cities the power to regulate and license certain motor vehicles, are not repugnant nor inconsistent. The provisions of the two acts, so far as they relate to the same subject, are not irreconcilable and there is no express repeal in the latter act.

An ordinance passed under the provisions of the Act of June 1, 1915, P. L. 685, designating certain streets on which interurban busses should be operated, and forbidding such operation upon other streets of the city, is not an unreasonable exercise of the power conferred in that act, nor does it conflict with the provisions of the Public Service Company Law. No individual has the right to operate as a common carrier, a motor vehicle for the transportation of persons and property without first obtaining from the Public Service Commission a certificate of public convenience, but the authority to designate the city streets over which such motor vehicle shall operate is by the Act of 1915 vested in the municipality.

Setzer vs. City of Pottsville 348

NEGLIGENCE

It is vain for a passenger alighting from a street car to say that she did not see the obstruction which caused her injury, when, by using her sense of sight, she would have seen her danger and been able to avoid it.

Sweeney vs. Schuylkill Ry. Co. 1

The driver of a wagon, or other vehicle, is required, at all times, in the exercise of due care, to make use of all his faculties when engaged in traveling along a public highway, to discover dangers. He must, at certain places pause to afford his faculties full play that he may better protect himself; when he has reason to suspect from the condition of the highway or an unusual disturbance of his vehicle, or team, that a danger exists, or something is wrong with the highway, it is his duty to stop his vehicle, and investigate. If, notwithstanding the warning given by the ordinary use of his faculties, or the condition of his vehicle, he persists going forward, the municipality will not be liable for any injury that may befall him.

In such a case the plaintiff was guilty of contributory negligence, as he did not use his faculties as the law requires, either in looking, feeling or appreciating difficulties plainly patent to an ordinary person. He should have seen the diverging roads and separating

horses, and noticed the tilting of the wagon, and taken precaution accordingly.

Shuman vs. Nort Union Township 44

In an action against the director general of railroads for damages caused by the burning of a barn, it appeared that according to the evidence of the plaintiff, a fire was discovered by defendant's employees in the plaintiff's field at a point 75 to 90 feet from the tracks. After the fire in the field had been extinguished another in a barn about 420 feet from the defendant's right of way and across a public road was discovered. There was no affirmative evidence that the fire from the field was communicated to the barn, and it was not contended that sparks reached the barn directly from the engine passing 420 feet away. Under such circumstances, the negligence of the defendant was not the proximate cause of the burning of the barn, and it was not error for the lower court to enter judgment non obstante veredicto.

Bartolet vs. McAdoo 52

When the facts and circumstances shown by the plaintiff fail to prove negligence or warrant an inference of negligence the presumption is that the employe was performing his duty in a proper manner.

A child is presumed to arrive at the age of discretion when seven years old and when under that age it is the duty of the parent to exercise due care over it and if the child is permitted to go into a dangerous place the parent is guilty of contributory negligence.

We'ker vs. Eastern Pa. Rys. Co. 228

The burden is upon the plaintiff to prove defendant's negligence and upon the defendant to prove contributory negligence.

Where no error is assigned to the admission or rejection of testimony or to the charge of the court the court will overrule a motion for a new trial.

Greiner vs. Crone 330

If an emergency presents itself so unexpectedly and so quickly that it confuses one who must act and deprives him of ability to exercise his best judgment the jury is warranted in finding the defendant not guilty of negligence and such finding will not be set aside by the court upon a motion for judgment non obstante veredicto.

Rice vs. Schuylkill Railway Co. 334

Where a borough maintains a traffic pole upon a street and fails to properly illuminate it, it is guilty of negligence but that must be the proximate cause of an accident in striking it; where a traveler is blinded by the lights of an approaching automobile and for that reason strikes such pole there can be no recovery because the pole was not the proximate cause of the accident.

In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

Beadle vs. Borough of Mahanoy City 378

Where a motorman on a trolley car uses his best judgment and keeps the car under control when approaching an automobile which

is being driven in an indifferent manner, without proper effort to get off the track, and a collision occurs the defendant company cannot be held guilty of negligence in an action to recover damages.

Dietrich vs. Pottsville Union Traction Co. 388

PARTIES

The right of a use plaintiff to maintain an action depends upon the right which the legal plaintiff has to maintain an action against the defendant.

When the lessor releases the sub-lessee he waives all rights which he had against the lessee.

Wenzel vs. Brennan 11

PARTITION

When an answer is filed to a petition for partition and sets up adverse possession, title and right of possession to the premises the court will direct an issue to find the facts.

Estate of Thomas W. Williams 277

PRACTICE

The statement must set forth a cause of action with accuracy and precision and the proofs must correspond.

An action founded upon a breach of an express contract cannot be sustained by proof of a breach of an implied contract.

An averment in an affidavit of defense that the goods were bought upon an express contract is sufficient to defeat judgment in an action upon a book account.

Rodestein vs. Fried 15

A statement of claim which sets out the amount agreed to be paid, the time employed and the rate per month is sufficient.

Gray vs. Wolf Creek Coal Co. 91

When the plaintiff's reply to the defendant's counter-claim is as specific as the counter-claim judgment will not be entered without a trial by jury.

Weaver vs. Krapf 93

Section 427, of the Act of 1919, P. L. 665 provides that exceptions to findings of fact may allege that such findings are not supported by competent evidence.

In compensation cases the credibility of the witnesses is for the referee or the Board and the court cannot disturb findings of fact by either where there is sufficient evidence to sustain the findings.

Bakunas vs. P. & R. C. & I. Co. 119

The acts of March 31, 1823, 2 Smith Laws 144 and May 3, 1909, P. L. 408 makes a certified copy of the agreement of merger of corporations competent evidence to prove merger.

The act of April 29, 1915, P. L. 207 provides that in cases of merger all rights of creditors and all liens shall continue unimpaired, &c.

The act of April 25, 1850, P. L. 569 provides that the provisions of the act of March 27, 1713 relating to limitation of actions shall not extend to any suit against any corporation which may have suspended business or made any transfer or assignments, &c.

The act of May 4, 1852, P. L. 574 gives the court power to amend all actions by changing or adding the name or names of any party when it appears that a mistake has been made.

Kuyalowicz vs. Schuylkill Gas & Water Co. 283

In appeals from a justice of the peace the pleadings must conform to the Practice Act of 1915, unless the parties agree in writing to proceed on the transcript.

If, upon the trial of an appeal from the judgment of a justice of the peace, the cause is tried upon its merits without regard to the fact that the defendant's set-off exceeds \$300, it is too late after verdict in favor of the plaintiff, to raise the question that the set-off exceeded the jurisdiction of the justice.

Blew vs. Phillips - ones Co. 298

When a statement of claim alleges a breach of an express contract to which the plaintiff was not a party and the evidence in a former action showed that there was no breach the matter is res adjudicata and the affidavit of defense raising such question of law must be sustained.

Dodson Coal Co. vs. Delano 308

A statement of claim which does not allege whether the contract sued upon was oral or in writing does not conform to the practice act of 1915 and the defendant should move to strike it from the record instead of setting up such defect in an affidavit of defense.

Stabinsky vs. King 4412

Rules of court have the binding force and effect of a statute and are to be complied with.

Where a condemnation proceeding has been restrained by injunction further action upon the same subject must wait until the equity proceeding is fully ended.

Mar Lin Water Co. vs. Lehigh Valley Coal Co. 415

REAL ESTATE

1. A written contract with an agent to secure a purchaser for real estate, does not empower him to execute a contract for its sale, unless thereunto specially authorized by writing.

2. Where there is no evidence that a wife refuses to join in a deed, because of fraud or collusion with her husband, there can be no decree for specific performance against her; nor against the husband alone, unless it be proved that the plaintiff offered to take a deed signed by th husband alone, and to pay the full amount of the purchase money.

Wagner vs. Zettlemoyer 316

SPECIFIC PERFORMANCE

Where no contract for the sale of land is shown to exist there can be no decree for specific performance.

Estate of Kate Conrad 281

TAX APPEALS

Hearing on an appeal from the board of revision may be before one or more judges in counties having more than one judge, is a

matter of convenience and practice and after hearing by one judge the proceeding follows the practice in equity and it is within the power of the court in banc to review all findings and fix different amounts and percentages. A separate appeal must be taken from each assessment.

It is the duty of an owner of unseated land to return it to the county commissioners with a particular description and to furnish the name of the original warrant or warrantee.

Assessors and all other taxing authorities must assess, rate and value every subject of taxation for local purposes according to the actual value thereof and at such rates and prices as the same would bring at a bona fide sale after due notice, but when the market value has thus been ascertained it becomes the duty of the court on appeal under the act of April 19, 1889, P. L. 37 to reduce the market value of the property for the purpose of assessment so that the ratio between the market and assessed value shall be the same as the ratio existing between the market values of all the real estate throughout the county.

Appeal of Albert Thompson 233

WARRANTY

The act of May 19, 1915, P. L. 543 provides that where a buyer makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose.

Dietrick vs. Carl 27

WAYGOING CROPS

A tenant for years is entitled to but one crop of winter grain, as a waygoing crop, for each year of his tenancy.

A waygoing crop may be forfeited by the lessee terminating his tenancy.

Brobst vs. Troy 2

WILL

Declarations by a party on his deathbed as to disposition of his property, with directions to secure a scrivener, cannot operate as a nuncupative will; the desire indicated was rather the disposition of his property by a written instrument.

A will drawn by testator's attorney and duly executed in the presence of two witnesses, will not be revoked by the expressed desire of the testator, where it appears that the testator stated his desire to change his will so as to give his estate to his two children by his divorced wife; that he directed that some one be sent for to draw a new will; that he persisted for twenty-four hours thereafter in such desire until he became unconscious and shortly afterwards died; that diligent efforts were made by his divorced wife to secure a scrivener; that testator asked her and a friend of such wife to be "dependable witnesses;" and that five days elapsed, after testator's death, before an alleged nuncupative will, of which the divorced wife was one of the witnesses, was reduced to writing.

Such a writing, even if it were a nuncupative will, could not be held to revoke the previous will, in view of the Act of April 8, 1883, P. L. 249, which expressly provides that a prior will can be revoked by a nuncupative will only when the latter is "committed to writing

in the lifetime of the testator, and after the writing thereof is read to or by him, and allowed by him, and proved to be so done by two or more witnesses."

Glebus's Estate 40

1. Notwithstanding the time of payment is not definitely fixed in the obligation, and maturity may not occur until after the death of the obligor to the obligee, and the obligor has lost dominion and control over the same the paper is not a will because the act of the obligor is irrevocable; irrevocability being an essential element of a will, and irrevocability destroys the testamentary character of the paper.

2. When a paper contains a promise to pay out of a particular fund, it does not amount to an assignment of the fund as against the holder of the fund unless he consents to the appropriation by an acceptance of the terms of the paper, and it is not binding upon other parties in interest in the absence of notice and consent.

3. Every man has the right to do with his property as he sees fit, and the fact that he transacts business a short time before his decease, and during his last illness does not invalidate his actions in the absence of any proof of fraud, undue influence or mental incapacity.

Estate of Hiram Moyer 63

Where a will works an equitable conversion of the real estate a sale is necessary to effect a distribution of the estate and when the executor has such power a partition proceeding is not proper.

Estate of Charles D. Kaier 81

The Public Service Company Act of July 25, 1913, P. L. 1374, contains no provision relating to the kind of evidence which may be received and acted upon by the commission; but, the commissioners not being considered as judges learned in the law, the legislature did not contemplate that the strict rules of evidence should be applied to their hearings.

In a crossing proceeding between a railway company and an electric railway company, the latter cannot allege that a contract between the railroad company and the railway company's predecessor in title, was not proved in accordance with law, where it appears that a copy of the contract in question was offered by counsel for the railroad company, with a statement that it was a copy of the agreement taken from the files of the company, where the originals of all agreements were kept, and had been prepared and verified by himself, such paper being presumably a copy of one on file, as required by the Act of 1913, with the commission, and its accuracy not being challenged.

Schuylkill Ry. Co. vs. Public Service 87

Where a person has testamentary capacity, but is so weak, physically or mentally, as to be susceptible to undue influence and a substantial part of his estate is left to one occupying a confidential relation to him, the burden is upon the latter to show that no improper influence controlled the making of the will, but in a case where the decedent's testamentary capacity is conceded and there is no evidence of weakened intellect, the burden is upon those asserting undue influence to prove it even where the bulk of the estate is left to one occupying a confidential relation.

Estate of William Buechley 267

An infant cannot act as administrator nor executor and when

all persons entitled to administer are under age the register may grant letters to any other fit person, subject to termination as provided by the act of March 15, 1832, P. L. 135.

A minor cannot make a will; act of April 8, 1833, P. L. 249. The register of wills may revoke letters improperly granted.

Stahler vs. Moser 359

WORKMEN'S COMPENSATION

Where a conclusion of fact is deduced from other facts established the latter facts should be fully set forth in writing.

Section 425 of the Workmen's Compensation Act of 1919 requires the board to make a statement in writing of the facts found by it.

Under Section 423 of the said act the board may disregard the findings of fact made by the referee. It may, in addition to the evidence taken before the referee, take other evidence, and it may base its findings either upon the evidence taken before the referee and the board, or exclusively upon that taken before the board. If the board takes into consideration the evidence taken before the referee, that fact should be made to appear of record.

Under Section 416 of the said act the board may treat a failure to answer a material allegation in a petition as an admission, or require proof of the fact, notwithstanding the admission. When the board elects to disregard such an implied admission, and requires proof of the fact of its own motion, its action should be made a matter of record.

Admissions may be established by pleadings, even though the pleadings were filed in an action wherein the parties are not identical with those upon the record.

Appeals from the action of the Compensation Board to the court of common pleas can only be taken on matters of law. The evidence only becomes a part of the record for the purpose of review, when by an exception filed the question that there is no competent evidence to sustain the award is raised.

Angello vs. P. & R. C. & I. Co. 18

When the evidence in a case for compensation shows that it was sufficient to sustain the findings made by the referee the court will not disturb the finding.

Dumblusky vs. P. & R. C. & I. Co. 25

Where compensation awarded against a railroad company by a referee to a wife for the death of her husband, was resisted by the company on the ground that at the time of the death of the decedent, he was in its employ in connection with its interstate commerce business, the burden was upon the company to show this before the referee.

If the referee decides that the burden was not met, and makes a finding from which the court of common pleas cannot determine whether the deceased was, or was not, engaged in interstate commerce, the referee's award in favor of the widow will be sustained by the Supreme Court.

Smith vs. P. & R. Ry. Co. 38

1. Section 306 of the Workmen's Compensation Act provides a schedule of compensation for (a) injuries resulting in total disability; (b) for injuries resulting in partial disability; and (c) for

permanent injuries due to a loss of one or more specified members of the body.

2. An agreement for compensation made to compensate a disability resulting from a fracture of the leg, "to continue within the limitations of the Workmen's Compensation Act," will not be terminated at the end of 150 weeks, on the ground that the compensable injury is, as a matter of law, a permanent one resulting from the loss of a foot.

Borskis vs Lehigh Valley Coal Co. 322

The Workmen's Compensation Board is not obliged to follow the rules of courts in law and equity in determining whether or not to set aside a "final receipt." Where such receipt is given and the condition of the claimant changes, the Workmen's Compensation Board may go behind the agreement and consider the case on the merits.

Mere delay for three days in applying for treatment is not a refusal to accept reasonable surgical aid, where the testimony of the employer's surgeon was that the injury might have been no less serious even if it had been treated immediately.

The Amending Act of June 26, 1919, P. L. 642, was not designed to substantially reenact the old law as to contributory negligence nor to deprive an employee of compensation because he did not follow all the directions of all the physicians and surgeons deputed to look after him. Its purpose was to allow a defense by the employer where injury or larger incapacity are entirely the result of unwillingness of the employee to receive treatment.

Parlovich vs. P. & R. C. & I. Co. 370

*By C.H.
7/5/1919.*

